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Supreme Court, U.S.
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NO. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Scott F. Linde,

Petitioner

vs.

Carrier Coal Enterprises, Inc., and Barbara Warakomski, Court-Appointed Receiver for Raymond Colliery, Co., Inc. And Its Subsidiaries,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), this Court held that a federal court of appeals does not have jurisdiction over a party who is not specifically designated as an appellant in a timely filed notice of appeal. In Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937), this Court held that a federal court of appeals does not have the power to modify a judgment in favor of an appellee who has failed to file a notice of cross-appeal.

The related questions presented here are:

1. Where A and B, as co-parties, are adversely affected by a final district court order and A timely appeals that order, is the filing by B of a separate notice of appeal under Fed.R.App.P. 4(a)(3) a jurisdictional prerequisite for B to secure relief from the district court ruling, as suggested by Torres and Morley and as several courts of appeals have held, or is Fed.R.App.P. 4(a)(3) a waivable "rule of practice" that does not preclude the non-appealing B from securing relief from the final district court order, as the Third Circuit held in this case?

2. If the filing of a separate notice of appeal is not a jurisdictional prerequisite to awarding relief in favor of a non-appealing party, should non-compliance with Fed.R.App.P. 4(a)(3) be waived where A was not acting as the surrogate of the non-appealing B, and the appellate court did not grant relief to B when the preclusive effect of the failure to appeal was raised by A in response to B's petition for rehearing after the appellate court directed relief in favor of A alone?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Scott F. Linde, who was an appellee, and the respondent Carrier Coal Enterprises, who was an appellant. The court-appointed Receiver of the properties of Raymond Colliery Co., Inc. and its subsidiaries, Thomas H. Kiley, was also an appellee in the court below and supported Linde's position. The Receiver has been named as a Respondent to this Petition at the request of the Receiver's counsel.*

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* Thomas H. Kiley resigned as the Receiver effective October 4, 1991, and has been replaced by Barbara Warakomski.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Scott F. Linde, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this case on September 5, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit for which review is sought is reported at 943 F.2d 335 under the caption United States v. Tabor Court Realty Corp., and is reprinted in the Appendix hereto at 174a, infra.

A related opinion of the Court of Appeals for the Third Circuit was filed in these proceedings on October 12, 1989, docketed to Nos. 89-5157 and 89-5198, and has not been reported. It is reprinted in the Appendix hereto at 63a, infra.

The United States District Court for the Middle District of Pennsylvania issued opinions in the proceedings below on January 24, 1989, May 23, 1990, and August 15, 1990. These opinions have not been reported, and are reprinted in the Appendix at 40a, 105a and 131a, respectively.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. §1331 and 26 U.S.C. §7402(a), respondent requested the United States District Court for the Middle District of Pennsylvania to enforce an assignment pertaining to court-administered receivership property. On August 15, 1990, the district court denied respondent's Motion.

On respondent's appeal, the Third Circuit, on September 5, 1991, entered a judgment and opinion, essentially reversing the district court ruling of August 15, 1991, and remanding the matter to the district court with instructions to vacate its final order of January 24, 1989, an order from which respondent had not appealed.

See 174a, infra. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES OF APPELLATE PROCEDURE INVOLVED

28 U.S.C. §2106. DETERMINATION

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. §2107. TIME FOR APPEAL TO COURT OF APPEALS

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in any action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry. ...

Fed.R.App.P. 4(a)(3). APPEAL AS OF RIGHT - WHEN TAKEN - APPEALS IN CIVIL CASES

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14

days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

STATEMENT OF THE CASE

A. Overview

By unpublished opinion dated October 12, 1989 (App. 63a), the Third Circuit reversed a district court order of January 24, 1989 that, inter alia, had (a) disapproved an Assignment by which petitioner Scott F. Linde ("Linde") had assigned to respondent Carrier Coal Enterprises ("Carrier") his interests in an Agreement of Sale to purchase receivership property; (b) ordered that the Agreement of Sale between Linde and the Receiver remain "in full force and effect"; and (c) re-opened the bidding process to which the Agreement of Sale had been made subject. (App.46a.) The Third Circuit remanded the matter with instructions to the district court to either conduct a hearing to determine whether there had been collusion in the conduct of the sale or confirm the sale of the receivership property to Linde, the only party to have appealed the January 24, 1989 Order. Carrier's rehearing petition, requesting that the remand directive be modified to call for confirmation of the sale to Carrier in accordance with the Assignment, was denied.

In its opinion of September 5, 1990 (App. 174a), the Third Circuit addressed the issue of whether Carrier's failure to appeal the January 24, 1989 order precluded Carrier from seeking to enforce the Assignment over Linde's objections. The Third Circuit, observing that there is disagreement among the circuits as to whether the filing of a notice of appeal under Fed. R. App. P. 4(a)(3) is a jurisdictional prerequisite for a party to secure relief from a final order, ruled that the filing of a separate notice of appeal is only "a rule of practice

which may be waived in the interest of justice under appropriate circumstances." (App. 189a-190a.) Concluding that the interests of Carrier and Linde in the first appeal were "inextricably intertwined," the Third Circuit concluded that Carrier's failure to appeal should be excused. (App. 194a.) Although the appeal then before the Third Circuit was from an order of the district court dated August 15, 1990, denying Carrier's motion to direct specific performance of the Assignment, the Third Circuit judgment remanded the matter to the district court with instructions "to vacate its January 24, 1989 order...." (App. 212a.)

B. The Agreement Of Sale Of May 20, 1988

By Order dated March 26, 1985, the United States District Court for the Middle District of Pennsylvania directed the foreclosure of the properties of Raymond Colliery Co., Inc. and its subsidiaries (the "Raymond Group") by an officer of the Court to satisfy the liens of the Raymond Group creditors. (App. 199a.) The court subsequently appointed Thomas H. Kiley as the Receiver of the Raymond Group properties. (App. 199a.)

On May 20, 1988, the Receiver executed an Agreement of Sale to sell to Linde or his assigns the Raymond Group's interests in approximately 652 acres of land in Lackawanna County, Pennsylvania. (App. 1a.) Linde agreed to pay $1,483,000 for the Raymond Group interests, approximately $200,000 more than the highest appraised value of those interest. (App. 205a.) Carrier had been presented with an almost identical draft contract to buy the Raymond Group interests that were the subject of the Linde Agreement of Sale for the same consideration that Linde had agreed to pay.[1] On May

[1] The Raymond Group interests in the land to which the Agreement of Sale applied was partly a reversionary interest and partly an unencumbered fee interest. The reversionary interest concerned land that was subject to term leases and term deeds in favor of Carrier. That part of the 652 acres in which the Raymond Group had an unencumbered fee interest was contiguous to the lands subject to the reversionary interest. (App. 207a.)

19, 1988, Carrier refused to execute the proposed Agreement presented to it.

By order dated August 8, 1988, the district court approved the Agreement of Sale subject to certain conditions, including that the proposed sale to Linde be advertised, that bids of more than 110% of the price to be paid by Linde could be submitted, and that final consummation of the sale was subject to court approval. (App. 206a.) Pursuant to the order, the Receiver advertised the proposed sale, informing the general public that until 10:00 a.m., September 2, 1988, the Receiver would accept written bids of not less than 110% of the purchase price set forth in the Agreement of Sale. The public notice also stated that "[i]f no such bid is offered, the Receiver shall seek final confirmation from the [court] to conduct the sale in accordance with the Agreement of Sale." (App. 207a.)

C. The Assignment.

Approximately two to three weeks prior to September 2, 1988, counsel for Carrier inquired of counsel for Linde as to whether Linde would consider assigning the Agreement of Sale to Carrier. (App. 207a.) On September 2, 1988, before the bidding deadline, Carrier informed Linde that it was willing to agree to Linde's requested consideration of $200,000 plus a re-conveyance to Linde of that part of the land being sold under the Agreement of Sale known as "Marvine Bank No. 6." (App. 208a.) Linde's and Carrier's attorneys informed the Receiver that the parties had agreed to a conditional assignment and that Carrier would not be submitting a bid. (App. 209a.) No party submitted a competing offer by the bidding deadline.

The conditional Assignment drafted by Carrier's counsel provided that "[Carrier's] obligation to effectuate payment of the agreed upon consideration ... is based upon [Carrier] obtaining approval of the [district court] to the execution of the deed conveying title to

[Carrier]." (¶4 of the Assignment, App. 7a.) The cash consideration was to be held in escrow, with counsel for Linde and counsel for Carrier serving as "escrow agents." Paragraph 4 of the Assignment stipulated:

> In the event that further approval of court approving the sale to [Carrier] is not obtained, then in that event, all monies paid pursuant to this Agreement shall be returned to [Carrier] and the parties released from further liability under this Agreement. [App. 7a; emphasis added.]

D. District Court Disapproval Of The Assignment

On November 21, 1988, the Receiver filed a "Motion to Impose Remedies for Unlawful Interference with Court Directed Sale of Real Property," claiming that the Assignment constituted an "unlawful interference with the court directed bid process." (App. 19a.) Named as respondents to the Receiver's motion were Carrier and Linde. In responding to the Receiver's Motion, Carrier repeatedly asserted that the court's approval of the Assignment was an essential condition precedent to its enforcement, (App. 25a, 28a), declaring that "in order to be valid and enforceable, the Assignment ... required the approval of [the district] Court." (App. 29a.)

Following an evidentiary hearing, the district court granted in part the Receiver's Motion. Specifically, the district court decreed that "[t]he Assignment ... is disapproved, [and] [t]he Agreement of Sale between ... Linde and the Receiver ... remains in full force and effect." (App. 46a.) The Receiver was directed to reopen the bidding process "subject to the same terms and conditions as set forth in [the] order of August 8, 1991." (App. 46a.) The order also provided:

> Nothing in this Order shall bar the Receiver from instituting an action for damages against Linde and Carrier ... or either of them if in the Receiver's Opinion the amount received by competitive bidding shall be less than $1,683,000 plus the fair market value of the Marvine Colliery Tract. [App. 47a.]

E. Linde's Appeal From The January 24, 1989 Order To Secure Specific Performance Of The Agreement Of Sale

Linde's motion for reconsideration of the district court order was denied on March 7, 1989. His notice of appeal was filed on March 10, 1989. Carrier was not mentioned anywhere, either in the caption or in the body, of Linde's notice of appeal. (App. 53a.)

Since an officer of the United States was a party in the trial court, the deadline for Carrier to file a notice of appeal was 60 days after the denial of Linde's motion for reconsideration, or May 6, 1989. Fed.R.App.P. 4(a)(1) and (4). Pursuant to Fed.R.App.P. 3(b), Carrier had the right to join in Linde's appeal after filing its separate timely notice of appeal. Carrier, however, chose not to file a notice of appeal.

By Order dated March 29, 1989, the district court denied Linde's motion to stay enforcement of the order of January 24, 1989. Carrier had opposed Linde's motion. (App. 50a.) Linde then timely moved in the Court of Appeals for a stay, arguing that "[i]f a stay pending appeal is not granted, Linde will be denied his right to meaningful appellate review in that the property in question will be sold at public auction, thereby preventing specific performance of the Agreement of Sale." (App. 215a; emphasis added.) Carrier opposed Linde's motion, adopting in full the Receiver's brief in opposition to the stay motion. The Third Circuit denied Linde's motion on April 19, 1989.

On April 17, 1989, Linde caused to be served on counsel for interested parties, including counsel for Carrier, his principal Third Circuit brief. Since the

district court had directed a second competitive bidding process and had threatened Linde with the forfeiture of his substantial deposit as well as additional sanctions solely because Linde had agreed to a conditional assignment of his interests under the Agreement of Sale to Carrier for valuable consideration, Linde's brief necessarily attacked the trial court ruling on the ground that he had the unfettered right to enter into the Assignment with Carrier. Linde's brief concluded by requesting that the Third Circuit "reverse the January 24, 1989 Order and direct the specific enforcement of the Agreement of Sale between Linde and the Receiver." (App. 57a; emphasis added.)[2]

On April 28, 1989, Linde assigned his interests under the Agreement of Sale to Lackawanna Land & Energy, Inc. "for additional support in prosecuting [the] appeal." (App. 89a.) The Receiver was promptly notified of the assignment to Lackawanna Land & Energy, of which Linde is President and own 46% of the stock.

On May 15, 1989, Carrier filed an unsolicited brief with the Third Circuit, adopting "in full the Brief heretofore filed by Linde." At the conclusion of its two page Brief, Carrier requested that the appellate court "reverse the January 24, 1989 Order of the District Court and direct that the assignment agreement between Linde and Carrier, and the Agreement of Sale between Linde and the Receiver be specifically enforced."

The judicial sale that the district court had required by its order of January 24, 1989 was conducted on May 26, 1989. At that sale, Linde caused to be read and distributed a statement, which, in part, provided:

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[2] Rule 28(a)(5) of the Federal Rules of Appellate Procedure requires that the brief of the appellant include "[a] short conclusion stating the precise relief sought." (Emphasis added.)

> Scott F. Linde claims an entitlement to specific performance of the Agreement of Sale of May 20, 1988, without further bidding .... The question of whether Scott F. Linde is entitled to purchase the lands in question in accordance with the terms of the May 20, 1988 Agreement of Sale is presently before the ... Third Circuit. If ... Linde prevails on that appeal, he and his assign, Lackawanna Land & Energy, Inc., will seek specific performance of that Agreement of Sale. [App. 61a; emphasis added.]

Carrier was the only party to make a responsive bid on May 26th, offering 110% of the purchase price set forth in the Agreement of Sale. On Tuesday, May 30, 1989, the first business day after the second judicial sale, Carrier requested and, within days, accepted the return of the $200,000 escrowed consideration with interest.[3] (App. 142a, 168a.)

The Receiver moved to confirm the results of the second judicial sale. Linde opposed that motion. Thereafter, the parties agreed that the ruling on the motion to confirm the sale to Carrier should be stayed pending the disposition of Linde's appeal.

Oral argument was conducted on Linde's appeal on July 10, 1989. Prior to the commencement of the argument, Linde consented to Carrier's request that he cede to Carrier three minutes of his argument time, reasoning that it was to his advantage to have a non-party argue in support of his position.

In its unpublished Memorandum Opinion of October 12, 1989, the Third Circuit found that "[t]he

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[3] Linde "was content that the escrowed funds be released to Carrier because [he] did not believe that [he] had any further claim against that money in light of Carrier's failure to obtain [district court] approval of the Assignment." (App. 218a.)

alleged frustration of the bid process by assigning the Agreement of Sale is insufficient reason to invalidate the assignment absent a finding of fraud or collusion." (App. 71a.) The Court also reasoned:

> By the [district] court's own words, it is the inadequacy of the price and the lack of any competitive bid upon which it bases its decision to deny confirmation. We find that to deny confirmation on this basis was an abuse of the court's discretion." [App. 73a.]

Accordingly, the Third Circuit reversed the January 24, 1989 order and remanded with instructions to either conduct a hearing on the question of collusion or confirm the sale to Linde.

On October 25, 1989, Carrier filed a "Petition for Panel Rehearing," arguing that the Third Circuit's direction to confirm the sale to Linde conflicted with the court's rationale. (App. 79a.) Carrier requested that the remand instructions be amended to afford the district court the alternative of confirming the sale to Carrier. (App. 80a.) Linde opposed the rehearing petition, arguing, inter alia, that "Carrier's failure to appeal the district court's Order precludes it from asking [the Third Circuit] to enter relief in its favor." (App. 92a.) On December 21, 1989, the Third Circuit panel denied the rehearing petition without comment. (App. 104a.)

F. Carrier's Appeal To The Third Circuit

On remand, the district court conducted evidentiary hearings and concluded that the Receiver had failed to establish collusion with respect to the judicial sale of September 2, 1988. (App. 122a.) The court's May 23, 1990 order confirmed the sale to Linde under the terms of the Agreement of Sale. (App. 105a.)

Carrier did not appeal this order. Instead, on June 8, 1990, it moved in the district court for an order

directing the specific performance of the Assignment. (App. 123a.) Jurisdiction was premised upon 26 U.S.C. § 7402(a) and the district court's power to decide all questions concerning the distribution of assets subject to administration by a court-appointed receiver. See Riehle v. Margolies, 279 U.S. 218, 223 (1929). Linde contested this motion, again arguing that Carrier forfeited its rights under the Assignment by failing to appeal the district court's January 24, 1989 order. (App. 127a.) By order dated August 15, 1990, the district court denied Carrier's Motion. (App. 131a.)

Carrier filed a notice of appeal from this order, invoking the Third Circuit's jurisdiction under 28 U.S.C. §1291. (App. 222a) Carrier also instituted a separate action for specific performance of the Assignment, and sought a stay of enforcement of the district court order of May 23, 1990. By order dated November 5, 1990, the district court denied Carrier's motion for a stay.

In its opinion of September 5, 1991, the Third Circuit ruled that once an initial notice of appeal has been filed, the appellate court has "the power to overlook the absence of a Rule 4(a)(3) notice [by a co-party] and to reverse or otherwise modify a non-appealed judgement or ruling." (App. 194a.) It concluded that because it had "assumed that Carrier's rights were being adjudicated during the Linde appeal," Carrier's failure to appeal the January 24, 1989 order should be excused. (App. at 196a; emphasis added.) The Third Circuit remanded the matter with instructions to vacate the January 24, 1989 order and with the recommendation that the district court consolidate this matter with the pending action for specific performance. (App. 212a.)

REASONS FOR GRANTING THE WRIT

A. The Third Circuit's "Rule Of Practice" Approach To Fed.R.App.P. 4(a)(3) Conflicts With Decisions Of This Court And Other Circuits.

The Third Circuit has acted at the instance of

Carrier to vacate a final judgment that Carrier never appealed. Moreover, the Third Circuit has directed this result even though it had been confronted with Linde's contention that Carrier's failure to appeal precluded Carrier from obtaining relief from the district court judgment when it denied Carrier's petition for rehearing in Linde's appeal.

The Third Circuit's decision undermines the strong public policy favoring finality in litigation, and is in conflict with decisions of this Court which hold that (a) federal appellate courts do not acquire jurisdiction over a party who is not identified on a notice of appeal as an appellant, thereby rendering the trial court ruling final as to that non-appealing party even though the appellate court rules in favor of appealing co-parties, Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988); (b) federal appellate courts should not resurrect "the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party [who has appealed]," Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 400 (1981); and (c) federal appellate courts do not have the power to modify a district court judgment for the benefit of an appellee who has not filed a notice of cross-appeal, Morely Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937). The Third Circuit ruling also conflicts with decisions of the First, Sixth, Seventh, and Tenth Circuits, which recognize that an appellate court does not have jurisdiction to award relief in favor of a non-appealing party. Because the Third Circuit decision conflicts with holdings of this Court, and in order to resolve a conflict among the courts of appeals, Linde has brought this petition for a writ of certiorari.

1. **The Third Circuit ruling conflicts with this Court's precedents that regard district court decrees final as to non-appealing parties.**

In Torres, this Court granted certiorari to resolve a conflict in the circuits over "whether a federal

appellate court has jurisdiction over a party who was not specified in the Notice of Appeal in accordance with [Fed.R.App.P.] 3(c)." Torres had been one of sixteen plaintiffs in an employment discrimination action. The Ninth Circuit reversed the district court's dismissal of their complaint. Torres' name, however, had been inadvertently omitted from the notice of appeal that had brought the dismissal of the employment discrimination action before the Ninth Circuit. On remand, the district court granted summary judgment against Torres on the ground that the original dismissal of the complaint was final as to him by virtue of his failure to appeal. This Court affirmed. Referring to Fed.R.App.P. 26(b), which precludes an appellate court from enlarging the time for filing a notice of appeal, this Court explained:

> We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former. Id. at 315 [emphasis added].

In the matter sub judice, the Third Circuit reasoned that the filing of an initial notice of appeal invokes appellate court jurisdiction over the entire case so that the appellate court obtains the authority to grant relief in favor of a party who has not appealed. The provisions of Rule 4(a)(3) apply equally to Carrier and Torres. Thus, under the Third Circuit's rationale, the Ninth Circuit did indeed have jurisdiction to extend the reinstatement of the complaint to the non-appealing Torres. Contrary to the Third Circuit's rationale, this Court's holding in Torres establishes that, as a

jurisdictional matter, a party's appeal brings before the court only so much of the lower court order that affects the appealing party. The part of the order that affects non-appealing parties is thus not "lawfully brought before [the court] for review." 28 U.S.C. §2106. Accordingly, just as the Ninth Circuit did not have jurisdiction to direct relief in favor of Torres despite having granted relief to 15 of his identically situated co-plaintiffs, so too did the Third Circuit lack the authority to grant relief in favor of Carrier despite having sustained the appeal of Carrier's co-party, Linde. Stated otherwise, just as the dismissal of the employment discrimination complaint became final as to Torres by virtue of his failure to perfect an appeal, so too did the district court order extinguishing Carrier's rights under the Assignment become final as to Carrier because of its failure to appeal.

The Third Circuit's holding plainly eviscerates Torres. In any co-party setting, one party's failure to comply with Rule 3(c) or 4(a)(1) can be excused at the discretion of an appellate court on the theory that Rule 4(a)(3) is "waivable" as to the non-appealing party. The only rational interpretation of Torres is that a notice of appeal has jurisdictional significance for each party. As Justice Marshall noted in Torres, "a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court." Id. at 317 n.3.

The filing of a notice of appeal on behalf of each party adversely affected by a lower court judgment serves the cogent public policy concern for finality in litigation. See Matton S.B. Co. v. Murphy, 319 U.S. 412, 415 (1943). The particular purpose of requiring each party to properly file a notice of appeal is to apprise the court, the appellees, and those parties who have already appealed that another party is unwilling to accept the judgment of the lower court. Where, as here, a co-party fails to appeal, the judgment as to that non-appealing party must be regarded as final, i.e., the litigation as to that party is at an end.

This Court has assiduously resisted attempts to

undermine the principle of finality inherent in Rules 3 and 4. See, e.g., Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982)(per curiam)(notice of appeal filed while Rule 59(e) motion was pending was a nullity under the clear terms of Rule 4(a)(4) and the Third Circuit did not have discretion to ignore the premature filing and accept jurisdiction); Browder v. Director, Department of Corrections, 434 U.S. 257 (1978)(notice of appeal filed after denial of an untimely motion for reconsideration did not establish jurisdiction). In both Griggs and Browder, the appeals courts had reversed the trial court decisions. By setting aside the appellate court rulings in those cases for want of jurisdiction, this Court demonstrated that enforcement of procedural rules with uncompromising rigidity is necessary to an orderly system of justice. As Justice Scalia, concurring in the judgment in Torres, explained:

> The principle that 'mere technicalities' should not stand in the way of deciding a case on the merits is more a prescription for ignoring the Federal Rules than a useful guide to their construction and application. By definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in a particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases. 487 U.S. at 319 [emphasis added].

Indeed, ad hoc dispensations of the requirements of Rule 4 "'in the long run actually produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar.'" Houston v. Lack, 487 U.S. 266, 283 (1988)(Scalia, J., dissenting.)

In this case, the rule of practice approach rewards

Carrier's strategy of being consistently inconsistent with respect to the Assignment. Carrier advised the district court that its approval of the Assignment was a condition precedent to its enforcement, but chose not to appeal that court's disapproval of the Assignment. Carrier initially declined an offer to return the escrowed consideration, but then requested and accepted from the "escrow agents" the cash consideration. It opposed Linde's efforts to stay the January 24th order, but later "adopted" Linde's Third Circuit brief. It participated in the second judicial sale, but then appeared at the Third Circuit oral argument (without being asked to do so by Linde) to argue for reversal of the January 24th order. At that time it knew that Linde considered the Assignment to be a nullity. Under these circumstances, Linde certainly had no assurance that Carrier would honor the Assignment if Linde prevailed. Nor was it clear that Linde would be entitled to specific performance of the Assignment in view of Carrier's failure to appeal. Thus, Linde justifiably believed he was appealing for his own account, and he explicitly sought relief only as to himself.

A party's filing of a notice of appeal reflects that party's "requisite commitment to assume the obligations of the appeal, particularly the obligation to pay any costs and fees that the appellate court might ultimately assess." Torres, 487 U.S. at 324 (Brennan, J., dissenting). Carrier not only deliberately refrained from making this commitment, its failure to appeal also enabled Carrier, as recognized by the Third Circuit, to play "both sides of the net in order to ensure that whatever the outcome of Linde's appeal, it was certain to get the property." (App. 187a.) The cogent policy of "finality" underlying notice of appeal requirements is intended to discourage such litigation "games." The appellate rules told Linde that when Carrier failed to challenge the district court judgment Linde was appealing for his own account. What the Third Circuit is suggesting is that Linde should have recognized that, all along, he was the unwitting dupe of Carrier's "tactics" to secure the

property "no matter what."

In an analogous context, this Court refused to permit litigation tactics to subvert the finality of a judgment that two of seven plaintiffs failed to appeal. In Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981), seven parallel civil anti-trust actions had been filed in the wake of a government price fixing lawsuit. Plaintiffs in five of the cases appealed the district court's order dismissing all seven complaints, each of which had been premised upon the averments of the government's complaint. The plaintiffs in the other two cases, however, refiled their actions in state court. The Ninth Circuit eventually reversed and remanded the five cases on the basis of an intervening precedent of this Court. The two state court actions were removed to federal court, and were dismissed on the basis of res judicata. The Ninth Circuit reversed, concluding that the interests of finality underlying res judicata must, "in rare instances, give way to overriding concerns of public policy and simple justice." 611 F.2d 1267, 1269. Just as the Third Circuit in this case relied upon its perception that the interests of Carrier and Linde were "inextricably intertwined," the Ninth Circuit declared that non-appealing parties may benefit from a reversal when their position is "closely interwoven" with that of appealing parties. 611 F.2d at 1269.

This Court reversed the Ninth Circuit, holding that res judicata does indeed bar a plaintiff's relitigation of an unappealed adverse judgment even though "other plaintiffs in similar actions against common defendants successfully appeal the judgment against them." 452 U.S. at 395. This Court relied upon Reed v. Allen, 286 U.S. 191 (1932), in which res judicata was applied to bar relitigation of an unappealed adverse judgment in ejectment even though an appellate court had ruled in a parallel interpleader action for rent that the party who lost the ejectment action was the owner of the property in question. Chief Justice Rehnquist, writing for the court in Moitie, explained:

> This Court's rigorous application of res judicata in Reed, to the point of leaving one party in possession and the other party entitled to the rents, makes clear that this Court recognizes no general equitable doctrine, such as that suggested by the Court of Appeals, which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party. Indeed, this case presents even more compelling reasons to apply the doctrine of res judicata than did Reed. Respondents here seek to be the windfall beneficiaries of an appellate reversal procured by other independent parties, who have no interest in respondents' case, not a reversal in an interrelated case procured, as in Reed, by the same affected party. Moreover, in contrast to Reed, where it was unclear why no appeal was taken, it is apparent that respondents here made a calculated choice to forego their appeals.... 452 U.S. at 400-01 [emphasis added.]

Moitie pronounced that the "vital public interest" that "there be an end to litigation," id. at 401, 402, must necessarily prevail over "any individual judge's ad hoc determination of the equities in a particular case." Id. at 401. As the Chief Justice observed, "[s]imple justice is achieved" by "evenhanded" application of rules of finality. Id.

The interest that "there be an end to litigation" undergirds not only Moitie, but also this Court's holdings that mandate strict compliance with the jurisdictional prerequisites to federal appellate court jurisdiction. The Third Circuit "rule of practice" approach erodes the jurisdictional implications of Rule 4, substituting discretion for evenhanded application of Rule

4(a)(3). Some co-parties will be unable to avoid the trial court judgment; others, like Carrier, will "be the windfall beneficiaries of an appellate reversal procured by other independent parties." 452 U.S. at 400. Just as this Court refused to recognize "an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party," id. at 400, so too should this Court decline to adopt a "rule of practice" that permits an appellate court to waive the filing of a notice of appeal where it is perceived that the non-appealing party's interests are "inextricably intertwined" with those of the appellant.

In this case, both the district court order of January 24, 1989 and the Third Circuit mandate directing confirmation of the sale to Linde had become final. While the Third Circuit's denial of Carrier's rehearing petition certainly had no precedential import, it is significant that the Third Circuit had been presented with the opportunity to relieve Carrier from the January 24, 1989 judgment in the direct appeal from that judgment. Linde was plainly justified in believing that the denial of Carrier's rehearing petition meant that if Linde prevailed on the question of collusion, the litigation would be at an end and he would acquire the Raymond Group properties. Instead, the Third Circuit has used Carrier's appeal of the August 15, 1990 district court ruling to effectively modify the mandate it had issued on Linde's appeal.

The Third Circuit based its "rule of practice" approach on Langnes v. Green, 282 U.S. 531 (1931). Even a cursory reading of Langnes, however, discloses that it did not address the jurisdiction of an appellate court to relieve a non-appellant from the judgment below. In Langnes, this Court merely affirmed the right of a respondent to argue in defense of a lower court decree a point that had been rejected by the lower court even though respondent had failed to cross-petition for certiorari. Describing as a "rule of practice" prior precedents refusing to consider an issue not presented on a cross-petition for certiorari, this Court observed that

those holdings did not "deny the power of the court to review objections urged by respondent, although he has not applied for certiorari, if the Court deems there is good reason to do so." Id. at 538 (emphasis in original). Thus, this Court did not address in Langnes the question of whether an appellate court has the authority to modify a lower court decree in favor of a non-appealing party.

This precise question, however, was addressed six years after Langnes in Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937). Framing the issue before the Court in Morley, Justice Cardozo stated: "the power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal is here to be admeasured." In reversing the appellate court's order directing that specific performance be decreed in favor of the appellee, Justice Cardozo explained:

> Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' United States v. American Railway Express Co., 265 U.S. 425, 435. What he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' The rule is inveterate and certain. Id. at 190 [emphasis added.]

Accord, LeTulle v. Scofield, 308 U.S. 415, 421 (1940)(although petitioner's tax liability would have been

substantially increased as a result of the Court's decision, respondent tax collector could not be awarded relief since he had not cross-petitioned for certiorari).

Significantly, Justice Cardozo cited Langnes in support of the "inveterate and certain" principle that a party may not seek to modify a judgment from which it has not appealed. Clearly, if this was merely a "rule of practice," Morely would have addressed the factors that justify waiving the "rule of practice." Instead, Justice Cardozo, on behalf of the unanimous Court, stated:

> Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees, at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment. Id. at 191 [emphasis added].

This Court has consistently declined to address an issue the resolution of which would enlarge the rights of a respondent or diminish the rights of a petitioner in the absence of a cross-petition for certiorari. See, e.g., County of Los Angeles v. Davis, 440 U.S. 625, 630 n.3 (1979); Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 560 n.11 (1976); NLRB v. Internat'l Van Lines, 409 U.S. 48, 52 n.4 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 n.4 (1970). Clearly, if an appellate court cannot modify a lower court judgment in favor of an appellee who has not filed a notice of cross-appeal, then surely the trial court judgment should not be subject to modification in favor of an appellant's co-party who has not appealed.[4]

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[4] As the Third Circuit recognized, Carrier was not even a proper party to Linde's appeal, but participated "more as an amicus rather than as an appellant of record." (App. 183a.)

The Third Circuit decision granting Carrier relief from the January 24, 1989 district court order plainly conflicts with applicable decisions of this Court. The absence of a "bright-line" approach to the necessity for each party to perfect an appeal in order to obtain relief from a district court judgment has produced protracted litigation, with the properties still in the hands of the Receiver. The Raymond Group creditors have not received the benefit of $1,483,000, and Linde has been denied the opportunity to develop the properties. A clear pronouncement that Rule 4(a)(3) is jurisdictional would avoid such consequences in the future. Accordingly, plenary review is appropriate to redress the conflict between this Court's precedents and the Third Circuit's holding.

2. The Third Circuit ruling conflicts with decisions of other circuit courts that hold that Rule 4(a)(3) is jurisdictional.

As recognized in Young Radiator Co. v. Celotex Corp., 881 F.2d 1408, 1415 (7th Cir. 1989), "several circuits have held that while a timely Rule 4(a)(1) initial notice of appeal is mandatory and jurisdictional, Rule 4(a)(3) ... is a rule of practice which can be suspended." See, e.g., Finkielstain v. Seidel, 857 F.2d 893, 895 (2d Cir. 1988); Scott v. University of Delaware, 601 F.2d 76, 83-84 (3d Cir.), cert. denied, 444 U.S. 931 (1979); Hysell v. Iowa Public Services Co., 559 F.2d 468, 470 (8th Cir. 1977); Arnold's Hofbrau, Inc. v. George Hyman Construction Co., 480 F.2d 1145, 1150 (D.C. Cir. 1973). Other circuits regard Rule 4(a)(3) as imposing a mandatory, jurisdictional requirement. See, e.g., S.E.C. v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984); Savage v. Cache Valley Dairy Association, 737 F.2d 887, 888-89 (10th Cir. 1984); Martin v. Hamil, 608 F.2d 725, 730-31 (7th Cir. 1979).

Those cases that have assessed the impact of Torres on this issue have either concluded that Rule 4(a)(3) must be regarded as jurisdictional or that, at a minimum, Torres cast serious doubt on the validity of the "rule of practice" approach. For example, in Young Radiator, plaintiff appealed an adverse judgment, but the prevailing defendant, Celotex, did not appeal the dismissal of its third-party claims. The Seventh Circuit reversed the ruling against the plaintiff. It then addressed the question of whether Celotex, in the absence of a Rule 4(a)(3) notice of appeal, could challenge the judgment entered for the third-party defendants. Concluding that the "whole case" rationale underlying the "rule of practice" could not be reconciled with Torres, the Seventh Circuit explained:

> [I]t could have been argued in Torres that the notice of appeal naming fifteen of the sixteen plaintiffs invoked the jurisdiction of the court over the whole case, so that a separate appeal by the sixteenth plaintiff would not be jurisdictionally required. Yet the Court's holding made clear that the requirements of Rules 3 and 4 must be satisfied as to each party, and precludes the argument in this case that Celotex's noncompliance with Rule 4(a)(3) can be waived. Id. at 1416 [emphasis in original].

Accord, Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc., 933 F.2d 376, 380 (6th Cir. 1991). See also, Pontarelli v. Stone, 930 F.2d 104, 107-12 (1st Cir. 1991)(court did not obtain jurisdiction over plaintiff's appeal where notice of appeal was defective in failing to identify plaintiff as an appellant despite the fact that appellate court jurisdiction was obtained over defendants who had cross-appealed).

In Piazza v. Aponte Roque, 909 F.2d 35 (1st Cir. 1990), four of five defendants had not been properly identified on a notice of appeal and the First Circuit

applied Torres to rule that it had not acquired jurisdiction over those defendants. See Marin-Piazza v. Aponte Roque, 873 F.2d 432, 433 (1st Cir. 1989). The appellate court then reversed an award of punitive and double damages as to the one defendant that qualified as an appellant. On remand, the non-appealing defendants sought to obtain relief from the punitive and double damages awarded against them. The district court did not amend the judgment as requested, and the defendants brought the matter before the First Circuit again. In recognizing that the logical consequence of Torres is that a party who does not properly appeal a judgment cannot obtain relief from that judgment, the First Circuit explained:

> Absent circumstances not present here, the inescapable consequence of failure to appeal a judgment within the time allowed is that the judgment becomes final. Thus, the crucial issue that we decided in Marin Piazza I relative to these four defendants was that because their names were not properly specified in the notice of appeal, no appeal was filed on their behalf. Since the time for appealing the district court's original judgment has long since expired, the judgment against [these four defendants] is no longer appealable. 909 F.2d at 39.

See also United States v. Lumbermens Mutual Casualty Co., 917 F.2d 654, 662-63 (1st Cir. 1990)(declining to decide whether Rule 4(a)(3) is jurisdictional, but holding that the "strictness in Torres" precludes waiving a party's failure to comply with that rule); Stockstill v. Petty Ray Geophysical, Div. of Geosource, Inc., 888 F.2d 1493, 1496-97 (5th Cir. 1989)(recognizing that in light of Torres the rule of practice approach previously followed by the Fifth Circuit is "questionable" and declining to excuse non-compliance with Rule 4(a)(3)).

The Torres ratio decidendi compels the conclusion that a failure to file a timely separate notice of appeal under Rule 4(a)(3) will constitute a jurisdictional bar to relieving the non-appellant from the trial court order, just as surely as will a failure to file a timely original appeal under Rule 4(a)(1). The Third Circuit ruling in this case, as well as decisions from other circuits that embrace a "rule of practice" approach, conflict with this rationale and decisions of the First, Sixth, Seventh, and Tenth Circuits. Plenary consideration of this issue is thus essential.

B. If Rule 4(a)(3) Is Not Jurisdictional, The Decision Below Raises Important And Unresolved Questions As To The Circumstances Under Which The Failure To Comply With Rule 4(a)(3) May Be Excused

Even if one accepts the Third Circuit panel's rule of practice approach, the instant case does not present facts upon which it is appropriate to deviate from the general rule which denies relief to non-appealing parties. Those cases which have dispensed with the general rule have done so only where confusing circumstances existed. See, e.g., Scott v. University of Delaware, supra, (appellate court would address certification of plaintiff class where prevailing defendant had no motivation to challenge class certification); Finkielstain v. Seidel, supra (plaintiff's failure to cross-appeal real party in interest order excused where appellate court ruling would result in a determination that a party with no right to defend itself would be the sole defendant). These cases generally resulted from a court's unwillingness to penalize litigants who could reasonably have determined that they had no reason to appeal.

The Third Circuit concluded that Carrier had a reasonable basis to assume that its "rights were being adjudicated during the Linde appeal." (App. 196a) The unsound premise for this conclusion is the Third

Circuit's reasoning that it could not afford relief to Linde without granting relief to Carrier.

Linde and Carrier chose a negotiated Assignment as opposed to participation in the judicial sale. To enforce the Assignment, however, Carrier was obligated to secure district court approval of the Assignment. Approval of the Assignment was committed to the court's sound discretion. See United States v. Branch Coal Corp., 390 F.2d 7, 10 (3rd Cir. 1968).

The district court disapproved the Assignment on the ground that it unlawfully interfered with the competitive bidding process. Linde thus necessarily argued on appeal that an assignment for valuable consideration did not constitute an improper interference with the bidding process. If the Assignment did not interfere with the competitive process, then a second judicial sale should not have been ordered. Because Carrier failed to appeal the decree disapproving the Assignment, the only relief that could properly be ordered on appeal was confirmation of the sale to Linde. Thus, the Third Circuit was not required to reinstate the Assignment in order to rule in Linde's favor.[5]

In almost any co-party situation the interests of the appealing and non-appealing parties are "closely interwoven." Indeed, even under the "rule of practice" approach, it is the "[t]he general principle that a judgment will not be altered on appeal in favor of a party who did not appeal [even in] cases in which the interests of the party not appealing are aligned with those of the appellant." 9 J. Moore & B. Ward, MOORE'S FEDERAL PRACTICE ¶204.11[4] at 56 (2d ed. 1991). "[T] party not appealing remains liable, despite the fact that the liability of each depends upon the same legal principles." Id. The Third Circuit decision both ignores and emasculates this

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[5] Viewed from another perspective, Linde's success on his appeal would not appear to have entitled him to specific performance of the Assignment. Carrier was in a position to assert that it accepted the trial court judgment, and since the condition precedent of district court approval of the Assignment had not been satisfied, Carrier could disclaim any obligation under the Assignment.

"general principle." The logical consequence of the Third Circuit's ruling is that, whenever the liability of each co-party depends upon the same legal principles, the efforts and risks of the appealing party may redound to the benefit of the non-appealing party, depending upon the appellate court's consideration of whether the non-appealing party had a reasonable basis to believe it was unnecessary to appeal. This is a completely unworkable approach.

The Third Circuit also premised its holding on In Re: Barnett, 124 F.2d 1005 (2d Cir. 1942). In that case, the district court (a) ruled that a trustee could set aside a bankrupt's assignment to her mother of the bankrupt's interests in her father's estate; (b) ordered the bankrupt to assign her interests in her father's estate to the trustee; and (c) enjoined the father's executors from recognizing the validity of the assignment. Only the bankrupt assignor appealed. The Second Circuit reversed the lower court, ruling that the trustee was not entitled to set aside the assignment. The trustee also conceded that the order requiring the bankrupt to assign her interests in her father's estate to the trustee was inappropriate. The question that divided the Second Circuit was whether it could reverse that part of the order that restrained the father's executors from recognizing the validity of the assignment in view of the assignee's failure to appeal. Significantly, unlike the instant case, the assignor did not object to reinstatement of the assignment.[6] Observing that the trustee had not objected to the appellant's attorney styling himself as attorney for both the bankrupt and the assignee, the majority concluded that the assignee had ample reason to believe her interests would be brought before the appellate court. Id. at 1009. Under

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[6] Barnett may have application here only if it was the Receiver who sought to restrain enforcement of the Assignment. It has no application where, as here, the assignor pursued the appeal to protect his interests in the contractual rights that had been the subject of the assignment.

these circumstances, the court ruled that complete reversal of the trial court was proper to avoid the ambiguity arising from a ruling that declared the bankrupt's assignment valid, but which did not address the order restraining the father's executors from recognizing the validity of the assignment. Thus, Barnett was premised upon the majority's finding that confusion would arise if the trial court's order was not completely reversed and upon its conclusion that the non-appealing assignee had reasonably assumed that her interests were being protected by the appeal.

The Third Circuit reliance upon Barnett was misplaced for at least three reasons. First, the assignor did not appeal to protect her interests in her father's estate, but instead appealed to protect the assignment to her mother.

Second, to the extent that relief was indeed afforded a non-appellant in Barnett, it was done so in the direct appeal to the order invalidating the assignment. In this case, the Third Circuit eschewed the opportunity to direct relief in favor of Carrier in Linde's appeal.

Third, and most importantly, Carrier could not have reasonably assumed that Linde was protecting Carrier's interests in pursuing the appeal. In his motion to stay enforcement of the district court order, as well as in his principal and reply briefs, Linde made clear that he was appealing to secure specific performance of the Agreement of Sale. On several other occasions, including the second judicial sale conducted on May 26, 1989, Linde apprised Carrier of his position that he was pursuing the appeal to protect his interests in the Agreement of Sale. Plainly, Carrier can claim no kinship with the non-appealing assignee in Barnett.[7]

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[7] The Third Circuit expressed its belief that Linde had caused the Court to conclude that he was appealing to protect the Assignment by failing to object to Carrier's sua sponte submission of a brief that adopted Linde's brief in full and by agreeing to cede three minutes of his oral argument time to Carrier. It was never anticipated that Linde's acquiescence to Carrier's participation would cause the Third Circuit to conclude that Linde was Carrier's

Even if Carrier reasonably believed that Linde's appeal was taken to protect Carrier's interests, such a belief is not a sufficient basis for waiving the requirements of Rule 4(a)(3). Indeed, in cases such as Torres there was plainly a reasonable belief by the non-appealing litigant that its interests were being protected in the appeal. No plausible explanation can be articulated as to why Carrier should be treated with more flexibility than Mr. Torres.

If there are to be exceptions to the necessity for filing a separate notice of appeal in order to secure relief from a judgment, then lower courts need guidance from this Court as to the parameters of those exceptions. The grounds suggested by the Third Circuit, i.e., closely interwoven interests and an assumption that a co-party is protecting the non-appealing party's interests, emasculate the general rule requiring separate notices of appeal, and are therefore unsatisfactory.

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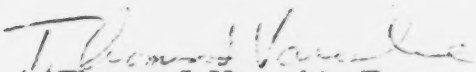
surrogate. Linde was shocked to learn that the Third Circuit believed it had been misled as to Linde's intentions with respect to the Assignment in light of the requests for relief in his appellate court papers and the position he took on Carrier's rehearing petition, which the panel unanimously denied. Moreover, even if Linde had objected to the filing of Carrier's Brief and had refused to cede any argument time to Carrier, the Third Circuit analysis that resulted in Linde prevailing on his appeal would not have differed one iota. Simply stated, the dispute between Linde and Carrier as to the continuing validity of the Assignment was immaterial to whether the district court had erred in finding that the Assignment improperly interfered with the competitive bidding process. Beyond this, Carrier knew full well Linde's position with respect to the Assignment when it sought three minutes of Linde's argument time. Thus, it was Carrier which was less than forthright by failing to acknowledge to the Third Circuit that it was aware of Linde's position with respect to the Assignment months before the Third Circuit heard oral argument in the first appeal.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

DILWORTH, PAXSON,
KALISH & KAUFFMAN



/s/ Thomas I. Vanaskie, Esq.
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Attorneys for Petitioner
Scott F. Linde

DATED: December 3, 1991

AGREEMENT OF SALE

THIS AGREEMENT made this 20th day of May, 1988, by and between RAYMOND COLLIERY CO., INC. by and through Thomas H. Kiley, Reciever, of Wilkes-Barre, Luzerne County, Pennsylvania (hereinafter referred to as "Seller"), and Scott F. Linde, Golf Hill, Box A, Honesdale, PA 18431, or his assigns.

WITNESSETH:

1. Upon the terms and subject to the conditions set forth herein, Seller agrees to release and quitclaim and Buyer agrees to buy all of Seller's right, title and interest in and to the surface and mineral rights only of the following premises, as more fully described on Exhibit "A", attached hereto and incorporated herein (hereinafter referred to as the "Premises"):

A. Powderly Bank, located in the Township of Carbondale, Lackawanna County, and approximately 61.93 acres contiguous to said Powderly Bank;

B. Jermyn Bank area, located in the Borough of Jermyn, Lackawanna County, and approximately 46.30 acres contiguous to said Jermyn Bank;

C. Northwest Bank, also known as Gravity Slope Bank, located in the Borough of Archbald, Lackawanna County, and approximately 3.50 acres contiguous to said Northwest Bank;

D. Eddy Creek, located partially in the Borough of Throop and partially in the Borough of Olyphant, Lackawanna County, and approximately 85 acres contiguous to said Eddy Creek;

E. Grassy Island, located in the Borough of Olyphant, Lackawanna County, and approximately 16.30 acres contiguous to said Grassy Island;

F. Marvine Bank # 6 located in the City of Scranton, Lackawanna County, and approximately 5.3 acres contiguous to said Marvine Bank #6; and

G. Moffat Bank area, located in the Borough of Taylor, Lackawanna County, and approximately 29.10 acres contiguous to said Moffat Bank.

2. The agreed upon consideration of such sale is One Million Four Hundred Eighty-three Thousand and 00/100 ($1,483,000.00) Dollars. Payment shall be as follows:

$148,300.00 Cash at the signing of this Agreement, receipt of which is hereby acknowledged.
$1,334,700.00 Cash or certified check at closing.

3. Seller shall release and quitclaim all of its right, title and interest in and to the surface and mineral rights only of the Premises by a quitclaim deed. Said deed will be delivered at the time of closing.

4. Closing shall take place at the offices of the Receiver on or before July 8, 1988 or such later date as is reasonably required to obtain the court approval provided for below, and said time is hereby agreed to be of the essence.

5. Realty transfer taxes shall be paid 1/2 by the Seller and 1/2 by the Buyer. Current real estate taxes shall be apportioned to the date of closing, and as set forth in that certain order dated April 30, 1986 of the United States District Court of the Middle District of Pennsylvania (Civil No. 80-1424). Seller's share of such real estate taxes and any and all other liens and encumbrances existing as of the closing date shall attach to the proceeds of the sale contemplated hereby.

6. If the Buyer fails to comply with its obligations under this Agreement, the sum or sums paid as a deposit on account are to be retained by the Seller, either on account of the purchase money, or as liquidated damages, in which case this Agreement shall thereupon become null and void and both parties released of all further liability hereunder.

7. The risk of loss of or damage to said property shall remain with Seller until date of closing. Should the Premises be partially or totally destroyed by any casualty prior to time of settlement, the Buyer shall have the option of accepting the Premises as damaged by completing closing or declaring this Agreement null and void, being refunded all deposits made, and both parties shall thereupon be released of all further liability hereunder.

8. This Agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

9. This Agreement and the obligation to close hereunder is subject to the prior approval of the United States District Court for the Middle District of Pennsylvania. Seller agrees to use reasonable best efforts to obtain said Court approval. In the event such approval is withheld by said Court, Buyer shall be repaid all deposit monies paid to Seller, and this Agreement shall thereupon become null and void, and both parties shall be released of further liability hereunder.

10. This Agreement shall not be recorded in the Office of the Recorder of Deeds or in any other office or place of public record and if Buyer shall record this Agreement or cause or permit the same to be recorded, Seller may, at its option, elect to treat such act as a breach of this Agreement.

THIS DOCUMENT MAY NOT SELL, CONVEY, TRANSFER, INCLUDE OR INSURE THE TITLE TO THE COAL AND RIGHT OF SUPPORT UNDERNEATH THE SURFACE LAND DESCRIBED OR REFERRED TO HEREIN, AND THE OWNER OR OWNERS OF SUCH COAL MAY HAVE THE COMPLETE LEGAL RIGHT TO REMOVE ALL OF SUCH COAL AND, IN THAT CONNECTION, DAMAGE MAY RESULT TO THE SURFACE OF THE LAND AND ANY HOUSE, BUILDING OR OTHER STRUCTURE ON OR IN SUCH LAND. THE INCLUSION OF THIS NOTICE DOES NOT ENLARGE, RESTRICT OR MODIFY ANY LEGAL RIGHTS OR ESTATES OTHERWISE CREATED, TRANSFERRED, EXCEPTED OR RESERVED BY THIS INSTRUMENT.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

In The Presence Of:

Raymond Colliery Co., Inc.

Thomas H. Kiley, Receiver

Witness:

Scott F. Linde

By:

ASSIGNMENT OF AGREEMENT OF SALE

THIS ASSIGNMENT, made this 2nd day of September, 1988, by and between SCOTT F. LINDE, an individual of Golf Hill, Box A, Honesdale, Pennsylvania 18431 (herein "Assignor") and CARRIER COAL ENTERPRISES, a Pennsylvania limited partnership with its principal offices at 11 East 44th Street, Suite 1700, New York, New York 10017 (herein "Assignee').

WITNESSETH:

WHEREAS, the Assignor is the equitable owner of seven (7) tracts of land situate in Lackawanna County, Pennsylvania by virtue of an Agreement of Sale (the "Agreement") dated May 20, 1988 by and between Raymond Colliery Co., Inc. by and through Thomas H. Kiley, Receiver (the " Receiver") and Assignor, a copy of which Agreement is marked Exhibit "A" attached hereto and incorporated herein; and

WHEREAS, the obligation of the Receiver to complete settlement under the Agreement is, inter alia, subject to prior approval of the United States District Court for the Middle District of Pennsylvania; and

WHEREAS, the sale of the premises described in the Agreement (the "Premises") are subject to the provisions of federal receivership law related to the sale of assets and an order of court which provide that the Agreement is subject to public bid in accordance with a Notice of Sale (the "Notice"), a copy of which is marked Exhibit "B", is attached hereto and incorporated herein by reference; and

WHEREAS, the Assignee desires to purchase from the Assignor all of its right, title and interest in and to the Premises and the Agreement; and

WHEREAS, the Assignor is willing to sell to the Assignee his interest in and to the Agreement and the Premises for the consideration hereinafter recited and under the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing premises and intending to be legally bound hereby the parties hereto agree as follows:

1. The Assignor hereby assigns, grants, transfers and sets over to the Assignee all of the Assignor's right, title and interest in and to the Agreement and any amendments thereto.

2. The Assignee agrees to pay to Assignor for this assignment the sum of $ 200,000. which sum shall be paid to Assignor upon signing of this Assignment in escrow to the Escrow Agents hereinafter named pursuant to the terms and conditions of this Agreement as hereinafter set forth. Allan M. Kleiger, Esq. and Murray Eberg, Esq. hereby named as "Escrow Agents" under this Agreement for any and all escrow accounts established hereunder.

3. Assignor warrants and represents to the Assignee that it has the right to effectuate this Assignment without the consent or approval of any court, agency, or any other person. Assignor also warrants and represents that he has not encumbered his equitable title to the Premises and that his interest in the Premises is being assigned free and clear of all liens, encumbrances and security interests.

4. Assignee's obligation to effectuate payment of the agreed upon consideration under this Agreement is based upon Assignee obtaining approval of the court for the United States District Court of the Middle District of Pennsylvania to the execution of the deed conveying title to Assignee. In the event that further approval of court approving the sale to Assignee is not obtained, then in that event, all monies paid to pursuant to this Agreement shall be returned to Assignee and the parties releases from further liability under this Agreement.

5. Assignor and Assignee hereby acknowledge that the Assignor's right to complete settlement under the Agreement of Sale is subject to an auction sale to be conducted in accordance with the Notice attached hereto. In the event that the Receiver obtains any bids with respect to the purchase of the Premises which bid shall be in excess of llO% of the proposed purchase price set forth in the Agreement, and satisfies all other terms and conditions of the Notice as may be determined by the Receiver in his sole discretion, then this Agreement shall be null and void and of no other force and effect and all monies paid under this Agreement shall be returned to Assignee.

6. Upon order of the court approving the conveyance of the premises subject to the Agreement of Sale to Assignee, Assignee shall.pay to Assignor in addition to the consideration required hereunder the sum of $148,300.00 which represents the payment made to the receiver pursuant to the terms and conditions of the Agreement.

7. [illegible] and [illegible] are hereby named as Escrow Agents for all escrow accounts that may be established hereunder. In the event a dispute arises as to the proper distribution of the funds held by the Escrow Agents, any party may petition the Court of Common Pleas of Luzerne County in an appropriate proceeding to determine who shall be entitled to said funds or any part thereof, and the parties agree to abide by the decision of said Court and the said Escrow Agents, upon making disbursement of said funds in accordance with the decision of said Court, or upon the mutual agreement of the parties hereto, shall be absolved of any further liability or responsibility in connection with this Agreement.

8. The Escrow Agents may rely upon and shall be protected in acting or refraining from acting upon any written notice or communication furnished to them pursuant to this Agreement and believed by them to be genuine and have been signed or presented by the proper party or parties and shall not be liable in connection with the performance by them of their duties pursuant to the provisions of this Agreement, except for their own willful default or willful negligence. The Escrow Agents shall not be liable for any action taken by them in good faith and believed by them to be authorized or within the rights or powers conferred upon them by this Agreement. The parties hereto agree to indemnify and hold the Escrow Agents harmless from and against any loss, liability or expense incurred without willful default or willful negligence on the part of the Escrow Agents arising out or in connection with this Agreement, including the cost and expense of defending themselves against any claims or liability. All monies paid to the Escrow Agents hereunder shall be placed in an interest-bearing account as the Escrow Agents in their sole discretion may deem desirable.

9. Assignor informs the Escrow Agents that his Social Security No. is 173-38-2497 and that all of the interest which shall accrue in the escrow account shall be deemed income of the Assignor.

10. The Agreement shall bind the heirs, executors, administrators, successors and assigns of the parties hereto.

Incorporated within this Agreement is an additional paragraph to which has been handwritten, signed by the parties and amended hereto.

IN WITNESS WHEREOF, the parties hereto intending tbe legally bound hereby st their hands and seals the first day written above.

WITNESS _____ _____ (SEAL)
SCOTT F. LINDE

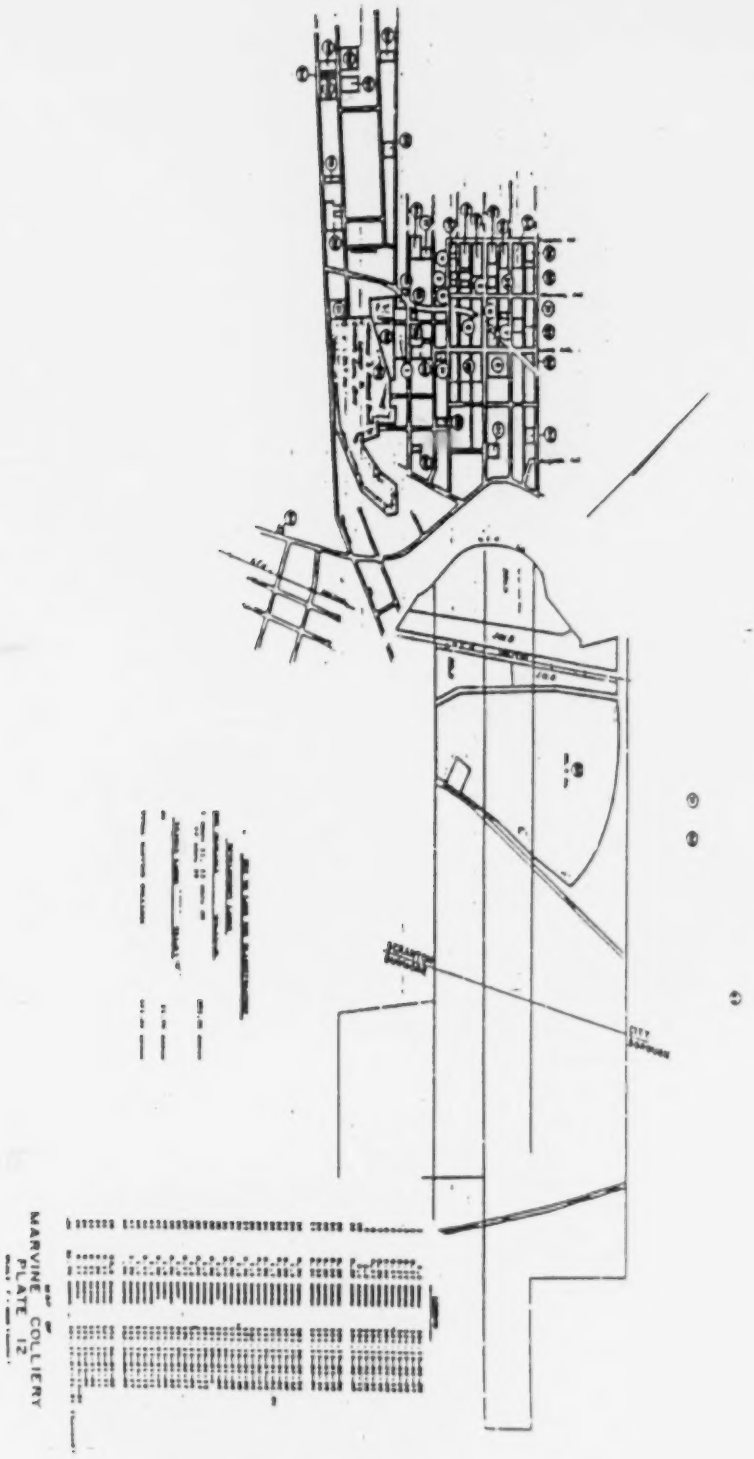
CARRIER COAL ENTERPRISES,
a Pennsylvania Limited Partnership

ATTEST: By: LAREDO GENERAL CORP.
General Partner

_____ _____
By: GEORGE B.MYRTETUS
Vice President

(d) In addition to the payment price to be paid by Assignor to Assignee set forth in paragraph (c) above, Assignor shall also transfer and assign by quitclaim deed all its right, title and interest to and in to Assignee the Marvine Colliery property as outlined in blue in the map attached hereto and labelled Plate 12, Map of Marvine Colliery.

Lewis F. Lee
D. B. Mygatt



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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, vs. Plaintiff GLENEAGLES INVESTMENT CO.,INC., et al., Defendants	CIVIL NO 801424 Reassigned to Judge Muir 3/5/81

MOTION TO IMPOSE REMEDIES FOR UNLAWFUL INTERFERENCE WITH A COURT DIRECTED SALE OF REAL PROPERTY

Thomas H Kiley, Receiver of Raymond Colliery Co , Inc and its subsidiaries (hereinafter referred to as the "Raymond Group") by and through his attorney, Thomas P Brennan, hereby moves this Honorable Court for an order imposing remedies for unlawful interference with a Court directed sale of real property and in support of such motion states the following:

1 By Final Order And Judgment (the "Final Order") dated March 26, 1985, this Honorable Court: (a) in Paragraph 8 at Page 5 of the Final Order ordered the foreclosure of the properties of the Raymond Group by an officer of the Court pursuant to 28 U. S. C Sections 2001, 2002 and 2004 and 26 U. S. C. Section 7403(d) to satisfy the liens of the creditors of the Raymond Group; and (b) in Paragraph 11 at Page 6 of the Final Order retained jurisdiction over all other matters pertaining to the Final Order including the disposition of the lands of the Raymond Group free and clear of liens;

2 By Order dated April 30, 1986 this Honorable Court, among other things, appointed Thomas H. Kiley the Receiver of the

properties of the Raymond Group with authorization to seek purchasers for said properties but without power to sell such properties except upon due application made to this Honorable Court;

3. By Order dated December 16, 1986, this Honorable Court authorized and directed the Receiver to implement his Plan for the administration and liquidation of the property of the Raymond Group (the "Plan of Liquidation") which provided for, among other things, a bulk sale of the Raymond Group properties but with certain sales to be made pursuant to 28 U. S. C. Section 2001 (b);

4. By Order dated April 7, 1988 the Plan of Liquidation was amended so that the properties of the Raymond Group would be divided into four (4) categories with the lands in each category sold in bulk, or in part by private sale pursuant to 28 U.S.C .See 2001(b);

5. On May 20, 1988, the Receiver entered into an Agreement of Sale (the "Agreement of Sale") with Scott F. Linde, or his assigns involving approximately 651.90 acres in various municipalities in Lackawanna County, Pennsylvania, along with the coal thereunder, for the sum of One Million, Four Hundred Eighty-three Thousand and 00/100 ($1,483,000.00) Dollars.

6. The original Agreement of Sale had included a paragraph which prohibited assignment of the Agreement of Sale without the written consent of the Receiver, and had been to Scott F. Linde, as buyer. Scott F. Linde requested that the Receiver remove the paragraph prohibiting assignment and have the buyer be Scott F. Linde or his assigns, so that Mr. Linde could acquire partners or other investors to help Mr. Linde complete the purchase.

The Receiver only agreed to Mr. Linde's request so that such partners or investors could be obtained to assist Mr. Linde with the purchase.

7. The receiver, through counsel, filed with this Honorable Court a motion for authority to sell the land and coal which is the subject matter of the Agreement of Sale pursuant to the Plan of Liquidation. The Agreement of Sale which had attached as Exhibit "A" thereto the legal description of the acreage being sold was filed with the Motion. A copy of this motion and proposed Order were forwarded to Allan Kluger, Esquire, attorney for Scott F. Linde, at the same time the motion was being mailed to the Clerk of Courts for filing;

8. By Order dated August 8, 1988 (the "August 8, 1988 Order") this Honorable Court approved the sale of the aforesaid lands and coal to Scott F. Linde upon the terms and subject to the conditions set forth in said Order which terms and conditions included that the sale was subject to publication requirements, to the acceptance of higher bids and to final confirmation by the Court;

9. Pursuant to the August 8, 1988 Order, the Receiver caused the terms of the sale to Scott F. Linde to be published once a week for three (3) consecutive weeks in the Scranton Times, a newspaper of general circulation in Lackawanna County. The proof of publication which also sets forth the terms and conditions for bidding is attached hereto as "Receiver's Exhibit 1";

10. A copy of the publication as it appears in Receiver's Exhibit 2 was forwarded to all parties and to Attorney Kluger prior to the date which was set at the last date on which the Receiver would receive bids. As set forth in the publication, the Receiver set 10:00 a.m. September 2, 1988 as the final date and time for receiving bids in response to the publication;

11. At no time prior to September 2, 1988 or for that matter at no time on or after September 2, 1988 has Scott F. Linde objected to the aforesaid motion and proposed order, the Order of August 8, 1988 or the contents of the aforesaid publication;

12. As set forth in Paragraph 2, Page 1 of the Receiver's Motion For Authority To Sell Real Property, the land to which the motion applied is a Reversionary Interest as defined in the Plan of Liquidation, as amended; that is, it consists of lands encumbered with mine refuse banks which are subject to term leases and/or term deeds plus contiguous acreage not encumbered by said leases and deeds. Carrier Coal Enterprises is the lessee/grantee of most, if not all, the term leases and/or term deeds which pertain to the lands to be sold to Scott F. Linde;

13. This Agreement of Sale with Scott F. Linde was not the first sale entered into by the Receiver for the sale of a Reversionary Interest. Previously the Receiver had entered into agreements of sale for reversionary interests with Carrier Coal Enterprises for certain lands in the City of Scranton, Lackawanna County. At those previous sales, Louis DeNaples tendered bids in excess of one hundred ten percent (110%) of the purchase prices set forth in the agreements of sale which Carrier Coal Enterprises had with the Receiver.

Carrier Coal Enterprises, through its counsel, Rosenn, Jenkins & Greenwald, attempted to set aside the Receiver's sale to Louis DeNaples because of alleged irregularities in the bid process. This Court by Opinion and Order dated November 10 1987, denied the motiōn of Carrier Coal Enterprises to set aside the sales and approved the sales to DeNaples. The procedure being utilized by the Receiver in connection with the Scott F. Linde matter was substantially the same as was used in the previous Carrier Coal Enterprises matter Carrier Coal Enterprises and its counsel,therefore, have had experience with the bidding process being utilized for the sale of lands and the purpose for such bidding process;

14. On September 2, 1988 at approximately 9:30 a.m. Scott F Linde, his brother, Eric Linde, and Scott F. Linde's counsel, Allan Kluger, Esquire arrived at the Receiver's office on the ninth floor of the First Eastern Bank Building in Wilkes-Barre. Shortly thereafter representatives of Carrier Coal Enterprises and its counsel, Murray Ufberg, Esquire, arrived at the Receiver's office. At the Receiver's office, in addition to the Receiver and his Administrative Assistant, Barbara Warakomski, was his counsel, Thomas P.Brennan, Esquire;

15. Following their arrival the Lindes and their counsel and the representatives of Carrier Coal Enterprises and its counsel engaged in discussions in the corridor outside the Receiver's office;

16. At approximately 9:45 a.m. counsel for Scott F Linde and counsel for Carrier Coal Enterprises reentered the Receiver's office and advised the Receiver

and his counsel that Linde would be assigning his rights under the Agreement of Sale to Carrier Coal Enterprises and that Carrier Coal Enterprises would therefore not be submitting a bid to the Receiver. Counsel for Scott F. Linde and counsel for Carrier Coal Enterprises further advised that since the Agreement of Sale was to Scott F. Linde or his assigns and since the Agreement of Sale did not preclude an assignment, the proposed action was lawful and binding on the Receiver;

17. Counsel for the Receiver responded that an assignment to a competitive purchaser was in violation of the Agreement of Sale, was collusive and was an unlawful frustration of the bidding process. Counsel for the Receiver requested that the Receiver's's position be made known to the parties and that the proposed assignment be abandoned;

18. At approximately lO:O0 a.m. counsel for Scott F. Linde and counsel for Carrier Coal Enterprises advised that the assignment had been consummated and that there would be no bidding;

19. On Friday morning, September 9, 1988, Scott F. Linde delivered to the Receiver a copy of the Assignment dated September 2, 1988, which is attached hereto as "Receiver's Exhibit 2". While the Assignment is self-explanatory, it provides, in summary that Carrier Coal Enterprises is to pay Scott F. Linde Two Hundred Thousand and 00/100 ($200,000.00) Dollars for the assignment plus Carrier Coal Enterprises is to convey to Scott F. Linde one of the seven (7) parcels designated in the Agreement of Sale. Attorneys Ufberg and Kluger

are to act as escrow agents for the Two Hundred Thousand and 00/100 ($200,000.00) Dollars, referred to in the assignment.

20. On or about September 13, 1988, the Receiver, believing that Scott F. Linde had breached his Agreement of Sale by the assignment to Carrier Coal Enterprises, drew under the letter of credit which Scott F. Linde had provided as security for faithful performance under the Agreement of Sale. The amount drawn under the letter of credit is One Hundred Forty-eight Thousand, Three Hundred and 00/100 ($148,300.00) Dollars and such amount is being held by the Receiver pending these legal proceedings;

21. The Receiver's position has been and continues to be that Scott F. Linde does not have the right to assign his interest under the Agreement of Sale to a party with a competitive interest and that the agreement entered into by Scott F. Linde and Carrier Coal Enterprises is an agreement which is unlawful and has caused harm to the Receivership. Accordingly, the Receiver has refused to seek confirmation of the sale to Carrier Coal Enterprises on the terms set forth in the Agreement of Sale and, instead, hereby moves this Honorable Court for an order imposing remedies for the unlawful interference with the Court directed bid process.

22. The remedies which the Receiver seeks in this matter are as follows:

(a) The declaration of a constructive trust of the funds being held by the escrow agents with the direction to such agents to pay to the Receiver the Two Hundred Thousand and 00/100 ($200,000.00) Dollars being

held in escrow (the "Escrow Principal), together with all the interest earned thereon, on the sixtieth (60th) day following the date of the Court's Order if the hereinafter authorized sale to Carrier Coal Enterprises is not closed by such sixtieth (60th) day, or, if such sale is closed by such sixtieth (60th) day, to pay to the Receiver on such closing date the Escrow Principal on account of the purchase price due from Carrier Coal Enterprises and all the interest thereon for the account of the Receivership;

(b) Determination that the Receiver sell and that Carrier Coal Enterprises purchase for the purchase price of One Million, Six Hundred Eighty-three Thousand and 00/100 ($1,683,000.00) Dollars all the interests in lands which are the subject of the Agreement of Sale, except for Marvine Bank #6 described in Paragraph lF of the Agreement of Sale, with such sale to be (i) by quit-claim deed; (ii) free of liens to date of closing; and (iii) with the Receiver and Carrier Coal Enterprises sharing equally all applicable realty transfer taxes;

(c) A determination that the Receiver may retain the One Hundred Forty-eight Thousand Three Hundred and 00/100 ($148,300.00) Dollars drawn under the letter of credit as liquidated damages for Scott F. Linde's breach of the Agreement of Sale; and

(d) Providing that the remedies provided in such Order are without prejudice to any other action the

Receiver may initiate against Scott F. Linde- and/or Carrier Coal Enterprises and/or any other persons or entities in connection with the Agreement of Sale and/or the bidding in connection therewith.

WHEREFORE, the Receiver moves this Honorble Court for an Order providing the remedies hereinabove set forth.

Respectfully submitted,
GALLAGHER , BRENNAN & GILL

By: _____
Thomas P. Brennan, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff vs. GLENEAGLES INVESTMENT COMPANY, INC., et al, Defendants	CIVIL NO. 80-1424 Reassigned to Judge Muir 3/5/81

BRIEF OF CARRIER COAL ENTERPRISES

I.
PROCEDURAL HISTORY AND FACTS

The Procedural History and Facts, as set forth in the Brief of the Receiver, are accurate. However, several significant facts are omitted.

A. First, Carrier was not a party to, or even aware of, the negotiations between the Receiver and one Scott F. Linde ("Linde") concerning the assignment prohibition in the agreement of sale ("Agreement of Sale") executed by the Receiver and Linde. In his Brief, the Receiver describes representations made by Linde concerning Linde's desire to acquire investment partners to assist in the purchase. The Receiver states that he agreed to remove the assignment prohibition only in order to facilitate Linde's seated intention of locating investment partners.

Carrier did not learn of the negotiations between Linde and the Receiver concerning the assignment clause until Carrier received a copy of the Receiver's motion. Prior to being served with the Receiver's motion, Carrier had been aware that Linde was attempting to locate investment partners, but Carrier did not know that a prohibition against assignment of the Agreement of Sale had been deleted from the agreement, or that the deletion had occurred because of Linde's representations that he wanted to obtain investment assistance. At the time that it executed the assignment with Linde ("Assignment"), Carrier knew nothing about the substance of the negotiations which had preceded Linde's execution of the Agreement of Sale. Carrier knew only that the Agreement of Sale, by its own clear and explicit terms, permitted assignment without qualification or condition.

B. In addition, the Receiver's Brief does not mention that Carrier, prior to Linde's execution of the Agreement of Sale, had also been involved in discussions with the Receiver concerning Carrier's execution of a similar agreement to purchase the real estate interests in question. These discussions concerned only the purchase price. Assignment was not an issue. While Carrier and the Receiver were negotiating over the price, we understand that the Receiver initiated contact with Linde. The discussions between Carrier and the Receiver were then terminated abruptly by the Receiver, when the Receiver executed the Agreement of Sale with Linde.

C. Finally, it is important to note that the Receiver has presumably obtained an appraisal of the real estate interests in question, since an appraisal is required by 28 U.S.C. Section 2001(b). The purchase price set forth in the Linde Agreement of Sale, coupled with the $200,000.00 that Carrier planned to pay Linde for the Assignment, would therefore necessarily be substantially in excess of the real estate's appraised value.

II.
ISSUES

A. Has Carrier knowingly interfered in the bidding procedure?

B. What remedies, if any, are appropriate under the circumstances?

III.
DISCUSSION

A. The Agreement of Sale expressly permitted assignment. without qualification or reservation.

Prior to its execution of the Assignment, Carrier was well aware that both Linde and the Receiver were represented by experienced counsel. Carrier reasonably concluded, as a result, that the provisions in the Agreement of Sale meant exactly and precisely what they clearly stated. If assignment of the Agreement of Sale were to be permitted only for the purpose of permitting Linde to acquire investment partners, why was this condition not stated? It would have been a very simple matter to insert such a condition in the Agreement of Sale. Knowing nothing about the substance of the negotiations between the Receiver and Linde, Carrier reasonably concluded that any assignment was permitted.

Carrier also knew that any contractual right can ordinarily be assigned unless the contract, by its own terms, prohibits assignment. In reviewing the provisions of the Agreement of Sale, Carrier also therefore reasonably concluded that Linde and the Receiver had inserted the clause permitting assignment in order to draw special attention to the Agreement of Sale's assignability.

B. Carrier did not attempt to hide the assignment. and Carrier specifically conditioned the enforceability of the assignment upon its approval by this Court.

The Receiver suggests that the Assignment was similar to an unlawful conspiracy consummated in secrecy. It was not. The Receiver cites In re Hayes' Estate, 159 Pa. 381, 28 A.2d 158 (1893), which held that "a secret combination among the persons interested in bidding..." was illegal.

However, the Assignment was not made in secret, and it was not a conspiracy. As the Receiver acknowledges in his Brief, the provisions of the Assignment were disclosed to the Receiver immediately prior to the bidding. Further, by its own terms, the Assignment could only be enforced if this Court gave its approval. How then could the Assignment be unlawful when it contains such a condition? How can the Receiver rationally equate the Assignment given its conditions and the circumstances surrounding its disclosure to a "secret combination"?

C. Carrier desired to purchase the real estate interests in question. in spite of a bidding process which it did not - and still does not - fully understand.

The Receiver points out in his motion that Carrier had previously participated in one of the Receiver's sales, and the Receiver suggests that Carrier's prior experience made it fully cognizant of the bidding procedures.

Actually, as the Court-may recall, Carrier's prior bidding experience became mired in legal controversy, and Carrier's prior experience has not inspired either Carrier or its counsel with any confidence that they understand the Receiver's bidding requirements.

For example, if Carrier had submitted a qualified competing written bid to the Receiver prior to 10:00 a.m. on September 2, 1988, and if Linde had then submitted its own higher bid precisely at 10:00 a.m., would Carrier have been permitted to respond, after 10:00 a.m., with another bid? Would Carrier have only one opportunity to submit a responding bid, or would an actual auction then occur? If Carrier were permitted to bid after 10:00 a.m., would third parties also be permitted to bid after 10:00 a.m., whether or not they had submitted a competing written bid prior to 10:00 a.m.? Carrier is not certain that it knows the answers to these and other troubling questions, Carrier was, and is, reluctant to guess at the outcome. Carrier requested clarification in writing from the Receiver as to the precise bidding procedures, and although the Receiver, through counsel, responded orally to Carrier's inquiries in a general fashion, the Receiver failed to provide specific bidding instructions in writing despite Carrier's request that he do so. Carrier's actions must be viewed in the context of these uncertain and imprecise rules

D. The Assignment between Linde and Carrier was in fact intended to enable Linde and Carrier to bid together as a legitimate joint venture.

The Receiver's Brief and Motion conveniently gloss over the fact that Linde was not simply assigning to Carrier all of Linde's rights under the Agreement of Sale. While the agreement between Linde and Carrier is entitled, "Assignment," the agreement is actually more

akin to a joint venture. For reasons unknown to Carrier, but presumably because of his inability to find other investment partners, Linde had decided to purchase for himself only one of the seven real estate interests which were the subject of the Agreement of Sale, and the other six real estate interests - not all seven - were to be purchased by Carrier. While the Assignment describes Linde's retention of the seventh real estate interest as part of the compensation being paid to Linde by Carrier, the actual effect of the transaction between Carrier and Linde was to cast the two parties in the roles of joint venturers, with Carrier bidding for the entire group of real estate interests, but subject to Carrier's contractual obligation to transfer one of those acquired interests to Linde, should Carrier be successful in its bid. The Receiver cites Section 1648 A of Williston on Contracts, Third Ed., for the proposition that "...Linde and Carrier did not join together to bid on the property as a joint venture." If anything, however, Section 1648 A, supra, helps to show that the Assignment between Linde and Carrier was a legitimate point venture. Thus, Section 1648 A, supra, makes specific reference to legitimate joint venturers who submit one bid because they desire to purchase property together and then "...afterwards... divide it into such parts as they wish to hold, neither desiring the whole... ." This description aptly applies to the relationship between Linde and Carrier. Further, Section 1648 A, supra, contrasts the above description with a situation where property " sold below its fair value" because of the agreement between the bidders. The property sold by the Receiver would have been purchased by Carrier at or above the property's fair market value, as shown by the Receiver's own appraisal.

The relationship between Linde and Carrier is not factually similar to that described in Frank v. Blumberg, 78 F. Supp. 671 (E.D. Pa. 1948), where one prospective bidder simply paid another not to bid at all. Under the Assignment, both Linde and Carrier were free to bid against third parties. Neither Linde nor Carrier was prohibited from participating in the bidding, but as to each other, the parties were simply agreeing that a single combined bid would be submitted and, if the bid were successful, the property thereby acquired would be divided between the two participants. Moreover, the entire agreement was invalid unless the Court specifically gave its approval.

E. Should the Court allow the Receiver to pursue other, undisclosed remedies against Carrier?

For reasons set forth elsewhere in this Brief, Carrier strenuously objects to the Receiver's characterization of Carrier's activities as collusive and unlawful, but if the Court so orders, Carrier will nonetheless accept the specific solution recommended by the Receiver as a remedy, given the misrepresentations allegedly made by Linde. However, Carrier cannot in any way concur in the Receiver's patently unconstitutional request that he be given blanket authority by the Court to take other, undisclosed punitive or corrective steps. Granting such unfettered authority to the Receiver would constitute a gross due process violation.

Furthermore, Carrier believes that the remedy proposed by the Receiver constitutes a complete remedy. If the Receiver is contemplating additional steps, he should so state now, and provide Carrier with an opportunity to respond.

IV.
CONCLUSION

Carrier did not intend to participate in any improper activity by executing the Assignment with Linde, nor does Carrier believe that it did so. Carrier had no knowledge of the substance of the prior negotiations between Linde and the Receiver concerning assignability of the Agreement of Sale, and Carrier was acting in accordance with the Agreement of Sale's explicit and clear language. Carrier's actions were also based in large part upon the uncertainties in the bidding process established by the Receiver, especially in light of the Receiver's's refusal to set forth detailed bidding procedures in writing. Furthermore, in order to be valid and enforceable, the Assignment between Linde and Carrier required the approval of this Court. Finally, if any improprieties did occur as the result of Linde's alleged misrepresentations, then the solution proposed by the Receiver provides a complete remedy. The power to impose additional, undisclosed remedies should not be conferred on the Receiver by this Court.

Respectfully submitted,
ROSENN, JENKINS & GREENWALD

BY: Robert Spielman

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Attorneys for CARRIER COAL ENTERPRISES
A Pennsylvania Limited Partnership

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff vs. GLENEAGLES INVESTMENT COMPANY, INC., et al., and SCOTT F. LINDE and CARRIER COAL ENTERPRISES, INC.	CIVIL NO. 80-1424 Reassigned to Judge Muir 3/5/81 (Complaint filed 12/20/80)

RECEIVER'S PROPOSED STATEMENT
OF FACTS AND CONCLUSIONS OF LAW

1. By Order dated March 26, 1985, the Court (a) in Paragraph 8 at Page 5 ordered the foreclosure of the properties of the Raymond Group by an officer of the Court pursuant to 28 U.S.C. Section 2001, 2002, and 2004, and 25 U.S.C. Section 7403(d) to satisfy the liens of the creditors of the- Raymond Group and (b) in Paragraph 11 at Page 6 retained jurisdiction over all matters pertaining to the disposition of the lands of the Raymond Group free and clear of liens. (FOF #2)

2 . By Order dated April l 20, 1986, this Court, among other things, appointed Thomas H. Kiley the Receiver of the proprieties of the Raymond Group with authorization to seek purchasers for said properties but without power to sell such proprieties except upon application made to this Court. (FOF #2)

3. On May 19, 1988, Scott Linde ("LINDE") met with the Receiver in the Receiver's office to discuss the purchase by Linde of seven (7) parcels of land situated

in Lackawanna County, Pennsylvania, for a purchase price of One Million Four Hundred Eighty-three Thousand and 00/100 ($1,483,000.00) Dollars. The seven (7) parcels of land are as follows:

A. Powderly Bank, located in the Township of Carbondale, Lackawanna County, and approximately 61.93 acres contiguous to the Powderly Bank;

B. Jermyn Bank Area, located in the Borough of Jermyn, Lackawanna County, and approximately 46.30 acres contiguous to the Jermyn Bank;

C. Northwest Bank, also known as Gravity Slope Bank, located in the Borough of Archbald Lackawanna County, and approximately 3.50 acres contiguous to said Northwest Bank;

D. Eddy Creek, located partially in the Borough of Throop and partially in the Borough of Olyphant, Lackawanna County, and approximately 85 acres contiguous to said Eddy Creek;

E. Grassy Island, located in the Borough of Olyphant, Lackawanna County, and approximately 16.30 acres contiguous to said Grassy Island;

F. Marvine Bank No. 6 located in the city of Scranton, Lackawanna County, and approximately 5.30 acres contiguous to said Marvine Bank No. 6; and

G. Moffat Bank Area, located in the Borough of Taylor, Lackawanna County, and approximately 29.10 acres contiguous to said Moffat Bank. (N.T. at 17, 31-32; May 20, 1988 Agreement of Sale; Warakomski Deposition at 9, 60-61).

4. During the course of the May 19 meeting, the Receiver informed Linde that any agreement he entered into for the sale of lands was subject to Court approval and that such approval would not be given until there had been a bid process to give others an opportunity to offer a higher price for the lands to be sold.

5. During the course of the May 19 meeting, the Receiver informed Linde that Carrier Coal Enterprises ("Carrier") had a definite interest in the seven (7) parcels by virtue of leases which Carrier had to remove the culm from such parcels.

6 . At the May 19 meeting, Linde was aware that the Receiver and Carrier had been negotiating the sale by the Receiver to Carrier of the seven (7) parcels of land set forth in Paragraph 3 hereof plus a parcel known as the Clinton Culm Bank.

7. During the course of the May 19 meeting, Linde informed the Receiver that he would like to enter into an agreement with the Receiver and that he would help the Receiver bring the parcels to bid.

8. During the course of the May 19 meeting, Linde informed the Receiver that he would need partners or co-investors before he could enter into an agreement for the parcels because he did not have the financial ability to complete the agreement.

9. During the course of the May 19, meeting, the Receiver gave to Linde a copy of the proposed agreement between the Receiver and Carrier, which proposed agreement had a provision which prohibited assignment of the agreement without the Receiver's approval.

10. On May 19, 1988, Linde, after he had his meeting with the Receiver, conferred with his brother, Eric Linde, and met with John Delvecchio and several of the Kaminski Brothers of Dupont for the purpose of their becoming co-investors with Linde in connection with the agreement of sale with the Receiver for the seven (7) parcels .

11. On May 19, 1988, Eric Linde, several of the Kaminski Brothers and John Delvecchio agreed to become such co-investors on the condition that Linde would assure them that he would be able to assign the entire Agreement of Sale to Carrier.

12. On May 20, 1988, Linde and his attorney, Terrance Herron of the law firm of Hourigan, Kluger, Spohrer and Quinn, met with the Receiver in the Receiver's office.

13. At that meeting the Receiver and Linde again discussed the potential of Carrier as a bidder for the parcels.

14. At that meeting, Linde again informed the Receiver that he needed co-investors to be able to sign an Agreement of Sale and complete the purchase contemplated thereby.

15. At that meeting, Linde asked the Receiver to modify the proposed Agreement of Sale so that applicable realty transfer taxes would be divided equally between the Seller and the Buyer.

16. At that meeting, Linde asked the Receiver to remove the paragraph which precluded assignment without the Receiver's permission and to add the phrase "or his assigns" after the Buyer's name.

17. At the meeting, Linde represented to the Receiver that the request for the removal of the paragraph precluding assignment and the adding of the phrase "or his assigns" was being made so that Linde would be able to assign the Agreement to his co-investors once he was able to determine definitely who those investors would be and once it could be determined the structure such co-investors would assume; i.e. a partnership or a corporation, etc.

18. Based upon the representation by Linde as to why the request was being made and solely to permit the assignment of the Agreement of Sale for the reason explicitly stated, the Receiver consented to the changes, and the Agreement of Sale was modified as requested.

19. Linde knew why the Receiver was consenting to his request and by reason of the prior discussions he had had with the Receiver, Linde knew that the Receiver would never have consented to the change in the document were he to have revealed that his real intent in seeking the change in the Agreement of Sale was because he wanted to be able to assign it to Carrier or to anyone else.

20. Linde fraudulently misrepresented to the Receiver his reason for wanting the agreement of Sale assignable in order to induce the Receiver to enter into the modified Agreement of Sale.

21. The Agreement of Sale as modified to accede to Linde's request was executed on May 20, 1988.

22. The Receiver, through counsel, filed a Motion for authority to sell the land and coal which is the subject matter of the Agreement of Sale. (FOF #6)

23. By order dated August 8, 1988, this Court approved the sale of the lands and coal to Linde upon the terms and subject to the conditions set forth in said Order which included provisions that the sale was subject to publication requirements, to the acceptance of higher bids, and to final confirmation by the Court. (FOF #7)

24. Pursuant to the August 8, 1988, Order, the Receiver advertised the proposed sale to Linde once a week for three (3) consecutive weeks in the Scranton Times, a newspaper of general circulation in Lackawanna County. The advertisement also set forth the terms and conditions for bidding. (FOF #8)

25. The interest of Raymond Colliery Co., Inc. in the land to which the Agreement of Sale applied is partly a reversionary interest and partly an unencumbered fee interest. The land which is a reversionary interest is subject to term leases and term deeds in favor of others in this instance Carrier Coal Enterprises. The lands which are not subject to reversionary interests are lands which are contiguous to the lands subject to reversionary interests. (FOF #9)

26. September 2, 1988, 10 o'clock a.m. was the date and time up to which bids could be submitted to the Receiver in connection with the Agreement of Sale.

27. Some two (2) to three (3) weeks prior to September 2, 1988, Murray Ufberg, Esq., the attorney for Carrier telephoned Allan Kluger, Esq., the attorney for Linde to inquire whether Linde would assign the Agreement of Sale to Carrier and if so, at what price.

28. Within a day or two, Mr. Kluger responded to Mr. Ufberg that the contract would be assigned for the sum of Two Hundred Thousand and 00/100 ($200,000.00) Dollars plus an agreement by Carrier to convey to Linde the parcel known as Marvine #6.

29. There were no further communications between Mr. Ufberg and Mr. Kluger until the morning of September 2, 1988, when Mr. Kluger again informed Mr. Ufberg that Linde would assign the agreement of Sale for Two Hundred Thousand and 00/100 ($200,000.00) Dollars plus an agreement for the conveyance of Marvine #6.

30. In the week or so before September 2, 1988, Mr. Myrtetus of Carrier had discussion with the Receiver about the bidding process and the Receiver indicated to Mr. Myrtetus a process which called for an auction and the qualification of bidders and which was at variance with the published bid procedure.

31. On September 2, 1988, at approximately 9:30 a.m., Linde, his brother, Eric Linde, and Linde's counsel arrived at the Receiver's office on the 9th floor of the First Eastern Bank Building in Wilkes-Barre. Shortly thereafter, representatives of Carrier and its counsel arrived at the Receiver's office (FOF #10)

32. Thomas P. Brennan, Esq., counsel for the Receiver was the person conducting the bidding.

33. Mr. Kluger and Mr. Ufberg inquired as to the procedure for bidding. Mr. Brennan informed Mr. Kluger and Mr. Ufberg that if their clients were the only interested parties, and if both wished an oral auction, the Receiver would accommodate that procedure so long as both parties agreed.

34. Mr. Kluger responded that his client would not agree to such an auction, and Mr. Brennan thereupon advised both counsel in the presence of the Receiver that the written, published bid procedure would control the proceedings, and he requested that he have each's highest bid in writing prior to 10:00 a.m.

36. Subsequent to the discussion about the bidding procedure, Mr. Ufberg and Mr. Kluger met with Mr. Brennan to advise him and the Receiver that Linde would be assigning his rights under the Agreement of sale to Carrier and that Carrier would not be submitting a bid to the Receiver. Counsel for Linde and counsel for Carrier further advised the Receiver that because the purchaser or purchasers in the Agreement of Sale were designated as Scott F. Linde or his assigns and because the Agreement of Sale did not preclude an assignment, the action by Linde and Carrier was lawful and binding on the Receiver.

36. Counsel for the Receiver responded that an assignment to a competitive purchaser was improper. (FOF #12)

37. Counsel for the Receiver and counsel for Linde then returned to the corridor outside the Receiver's office where the assignment was finalized.

38. Shortly before 10:00 a.m., counsel for Linde and counsel for Carrier advised the Receiver that the assignment had been consummated and that there would be no bidding. (FOF #13)

39. Linde and Carrier both understood that even if the assignment document itself did not preclude either from submitting a bid, their intent and expectation in connection with the assignment was that neither would submit a higher bid for the property.

40. Carrier and Linde were both aware prior to the finalizing of the assignment, that the Receiver considered the assignment as improper and a frustration of the bid process.

41. There was no reason for Carrier Coal Enterprises to enter into the assignment other than to avoid the bid process directed by the Court.

42. By entering into the assignment over the Receiver's objection, with the knowledge that such action was obviously destroying the bid process, and for the purpose of so destroying the bid process, Carrier joined with, and colluded with, Linde to destroy the bid process and to deprive the Receiver of the benefits of the Court Order bid process.

43. On Friday morning, September 9, 1988, Linde delivered to the Receiver a copy of the Assignment dated September 2, 1988. The Assignment provides, in summary, that Carrier shall, in consideration of the Assignment, pay Linde Two Hundred Thousand and 00/100 ($200.000.00) Dollars and convey to him one (1) of the seven (7) parcels of land, known as the Marvine Colliery property. (FOF #14)

44. Linde and Carrier acknowledged in Paragraph 5 of the Assignment that Linde's right to complete settlement under the Agreement of Sale was subject to an auction at 10:00 a.m. on September 2, 1988. (FOF #15)

45. On or about September 13, 1988, the Receiver, believing that Linde had breached the agreement of Sale by his assignment of his interest to Carrier, drew One Hundred Forty-eight Thousand Three Hundred and 00/100 ($148,300.00) Dollars under the letter of credit which Linde had provided as security for faithful performance under the Agreement of Sale and such amount is being held by the Receiver pending these proceedings. (FOF #16)

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, vs. Plaintiff	CIVIL NO 80-1424
GLENEAGLES INVESTMENT CO.,INC., et al., Defendants	Compliant Filed 12/12/80
	(Judge Muir)

ORDER
January 24, 1989

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On November 21, 1988, Thomas H. Kiley, Receiver of Raymond Colliery Co., Inc., and its subsidiaries ("Raymond Group"), filed a "Motion to Impose Remedies for Unlawful Interference With a Court Directed Sale of Real Property," along with a brief in support thereof. On December 20, 1988, Respondents Scott F. Linde and Carrier Coal Enterprises filed their briefs in opposition to the Receiver's motion. On December 30, 1988, the Receiver filed his reply brief. Pursuant to our order of January 9, 1989, a hearing on the question was held in Williamsport, Pennsylvania, on January 18, 1989. The Receiver's motion is now ripe for disposition.

Findings Of Fact.

1. By order dated March 26, 1985, this Court (a) in Paragraph 8 at page 5 ordered the foreclosure of the properties of the Raymond Group by an officer of the Court pursuant to 28 U.S.C. §§2001, 2002, and 2004, and

26 U.S.C. §7403(d) to satisfy the liens of the creditors of the Raymond Group; and (b) in Paragraph 11 at page 6 retained jurisdiction over all other matters pertaining to the disposition of the lands of the Raymond Group free and clear of liens.

2. By order dated April 30, 1986, this Court, among other things, appointed Thomas H. Kiley the Receiver of the properties of the Raymond Group with authorization to seek purchasers for said properties but without power to sell such properties except upon application made to this Court.

3. On May 20, 1988, the Receiver entered into an Agreement of Sale ("Agreement of Sale") with Scott F. Linde, or his assigns, involving approximately 651.90 acres in various municipalities in Lackawanna County, Pennsylvania, along with the coal thereunder, for the sum of $1,483,000.00.

4. The original draft of the Agreement of Sale to Scott F. Linde as buyer had included a paragraph which prohibited assignment of the Agreement of Sale by Linde without the written consent of the Receiver. Linde requested that the paragraph prohibiting assignment be deleted and the buyer designated as Scott F. Linde or his assigns. This was done.

5. Prior to Linde's execution of the Agreement of Sale, the Receiver advised Linde that completion of the sale required court approval.

6. The Receiver, through counsel, filed a motion for authority to sell the land and coal which is the subject matter of the Agreement of Sale.

7. By order dated August 8, 1988, this Court approved the sale of the lands and coal to Scott F. Linde upon the terms and subject to the conditions set forth in said order which included provisions that the sale was subject to publication requirements, to the acceptance of higher bids, and to final confirmation by the Court.

8. Pursuant to the August 8, 1988, order, the Receiver advertised the proposed sale to Scott F. Linde once a week for three consecutive weeks in the Scranton Times, a newspaper of general circulation in Lackawanna County. The advertisement also set for the terms and conditions for bidding.

9. The interest of Raymond Colliery Co., Inc. ("Raymond") in the land to which the Agreement of Sale applied is partly a reversionary interest and partly an unencumbered fee interest. The land which is a reversionary interest is that part of the land where Raymond's interest is subject to term leases and term deeds in favor of others, in this instance Carrier Coal Enterprises ("Carrier"). The lands which are not subject to reversionary interests are lands which are contiguous to the lands subject to the reversionary interest.

10. On September 2, 1988, at approximately 9:30 A.M. Scott F. Linde, his brother, Eric Linde, and Scott F. Linde's counsel arrived at the Receiver's office on the 9th Floor of the First Eastern Bank Building in Wilkes-Barre. Shortly thereafter, representative of Carrier Coal Enterprises and its counsel arrived at the Receiver's office.

11. Following their arrival, the Lindes and their counsel and the representative of Carrier Coal Enterprises and its counsel engaged in discussions in the corridor outside the Receiver's Office and advised the Receiver that Linde would be assigning his rights under the Agreement of Sale to Carrier Coal Enterprises and that Carrier Coal Enterprises would not be submitting a bid to the Receiver. Counsel for Scott F. Linde and

counsel for Carrier Coal Enterprises further advised the Receiver that because the purchaser or purchasers in the Agreement of Sale were designated as Scott F. Linde or his assigns and because the Agreement of Sale did not preclude an assignment, the Action by Linde and Carrier was lawful and binding on the Receiver.

12. Counsel for the Receiver responded that an assignment to a competitive purchaser was improper.

13. Shortly before 10:00 A.M. counsel for Scott F. Linde and counsel for Carrier Coal Enterprises advised the Receiver that the assignment had been consummated and that there would be no bidding by either of them.

14. On Friday morning, September 9, 1988, Scott F. Linde delivered to the Receiver a copy of the Assignment dated September 2, 1988. The Assignment provided, in summary, that Carrier Coal Enterprises shall, in consideration of the Assignment, pay Scott F. Linde $200,000.00 and convey to him one of the seven parcels of land, known as the Marvine Colliery property.

15. Scott F. Line and Carrier Coal Enterpirses acknowledged in ¶5 of the Assignment that Linde's right to complete settlement under the Agreement of Sale was subject to an auction at 10:00 A.M. on September 2, 1988.

16. On or about September 13, 1988, the Receiver, believing that Scott F. Linde had breached the Agreement of Sale by his assignment of his interest to Carrier Coal Enterprises, drew $148,300.00 under the letter of credit which Scott F. Linde had provided as security for faithful performance under the Agreement of Sale and such amount is being held by the Receiver pending these proceedings.

Discussion

The Receiver of the Raymond Group's properties was required as one of his duties to sell those properties in order to obtain funds to satisfy the claims of creditors. Scott F. Linde agreed to buy from the Receiver certain of those properties for $1,483,000.00 On August 8, 1988, we issued an order directing the Receiver to open the sale of the properties to competitive bidding to test in the marketplace the adequacy of Linde's offer. We conditioned any sale of the properties upon our approval. See 28 U.S.C.A. §2001(West 1982) (court ordered sale of real property to be upon such terms and conditions as the court directs).

At the hearing held in Williamsport, Pennsylvania, on January 18, 1989, the Receiver's unrebutted testimony was that on the day of competitive bidding, September 2, 1988, Linde and Carrier Coal held discussions outside of the Receiver's office and subsequently informed him that Carrier Coal would not submit a bid for the properties. (T.R. at 24). Instead, Linde and Carrier Coal informed Kiley that Linde had agreed to assign the Agreement of Sale to Carrier Coal in exchange for $200,000.00, plus the Marvine Colliery parcel of land which was one of the seven parcels for which Linde had originally submitted his bid. (See Assignment of Agreement of Sale, ¶¶5, 10). Linde and Carrier Coal were the only ones who appeared to bid on the properties. (T.R. at 39).

We need not decide here whether there was actual collusion between Carrier Coal and Linde to depress the price paid for those properties. No one presented evidence concerning what was said by either Linde or Carrier Coal on September 2, 1988, during their conversations outside of the Receiver's Office. Nevertheless, the following is clear: Carrier Coal was willing to pay $1,683,000.00 for the Raymond Group's properties

excluding the Marvine Colliery parcel of land. How Much over the $1,683,000 Carrier would have paid for the Marvine Colliery tract is unknown. It obviously has some value and may be of substantial value. The Receiver was deprived of Carrier's bid because of the assignment agreement between Carrier Coal and Linde.

A court owes a duty to creditors to see to it that the property to be sold by a court appointed Receiver brings the maximum price to be applied to the claims of creditors. Ballentyne VS. Smith, 205 U.S. 285, 289 (1907). In the case before us we are confronted with two problems: first, that no bids were submitted on September 2, 1988, and second, that the evidence presented indicates that the purchase price in the agreement of sale was inadequate. Faced with these troubling facts, we could not in good conscience approve the assignment of the Agreement of Sale that has occurred here.

When we directed the Receiver to open bidding on the Raymond Group properties, our intention was to test the adequacy of the $1,483,000.00 price in the Agreement of Sale between Linde and the Receiver. Our goal has been, and remains, to obtain the highest market price for these properties to satisfy the claims of the Raymond Group's creditors. By assigning the Agreement of Sale to Carrier Coal in exchange for $200,000.00 and the Marvine Colliery parcel of land, Linde and Carrier Coal aborted the test the true value of the properties and they would have this Court approve a sale for a price that is substantially less than the market price. To do so would be contrary to the interests of the Raymond Group's creditors. We will not approve the sale to Linde when Carrier Coal was ready to pay a higher price than Linde and we disapprove of the conduct of Linde and Carrier Coal in this case.

Conclusions of Law.

1. The purpose of the bidding in this matter was to test the adequacy of the purchase price under the Agreement of Sale between the Receiver and Scott F. Linde and to generate higher bidding.

2. The Assignment between Carrier Coal Enterpirses and Scott F. Linde improperly stifled competitive bidding between Carrier Coal Enterprises and Linde and depressed the price to be paid to the Receiver.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The "Motion to Impose Remedies for Unlawful Interference with a Court Directed Sale of Real Property filed with this Court on November 21, 1988, by the Receiver of Raymond Colliery Co., Inc., Thomas H. Kiley, is denied in part and granted in part.

2. The Assignment between Scott F. Linde and Carrier Coal Enterprises of the Agreement of Sale executed between. Scott F. Linde and the Receiver, Thomas H. Kiley, 1 disapproved.

3. The Agreement of Sale between Scott F. Linde and the Receiver, Thomas H. Kiley, remains in full force and effect.

4. The Receiver, Thomas H. Kiley, shall reopen the bidding process subject to the same terms and conditions as set forth in our order of August 8, 1988, except that an abbreviated description or description incorporated in part by reference may be used by the Receiver if he deems it advisable.

5. The letter of credit provided by Scott F. Linde to the Receiver, Thomas H. Kiley, which was provided as security for his faithful execution of the Agreement of Sale, shall be credited against the purchase price of the lands to be sold provided that Linde is ultimately the successful bidder. If Linde is not ultimately the successful bidder, we will consider a motion for the fair disposition of these funds.

6. If the Receiver is of the view that he requires further authorization or direction with respect to the reopening and conduct of the bidding process relating to the Agreement of Sale, he may file a motion consistent with the findings of fact, conclusions of law, and discussion above together with an appropriate certificate of concurrence or nonconcurrence of counsel for Linde. No concurrence from counsel for Carrier is required.

7. Nothing in this order shall bar the Receiver from, instituting an action for damages against Linde and Carrier Coal Enterprises or either of them if in the Receiver's opinion the amount received by competitive bidding shall be less than $1,683,000 plus the fair market value of the Marvine Colliery Tract.

8. The Clerk shall send a copy of this order to counsel for each of the Receiver, Linde, and Carrier Coal Enterprises.

MUIR, U.S. District Judge

MM:rw

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff vs. GLENEAGLES INVESTMENT COMPANY, INC., et al. and SCOTT F. LINDE, Party to Agreement of Sale	CIVIL NO. 80-1424 Reassigned to Judge Muir 3/5/81 (Complaint filed 12/12/80)

ORDER

Upon Motion of Scott F. Linde, Party to Agreement of Sale in the above-entitled matter, for an order staying enforcement of this court's Order of January 24, 1989, pending the disposition of Scott F. Linde's appeal to the United States Court of Appeals for the Third Circuit and having considered Scott F. Linde's Motion and the opposition thereto, it appears to the court that the relief requested is necessary and proper pending Scott F. Linde's appeal in order to preserve Scott F. Linde's rights under the Agreement of Sale.

THEREFORE, IT IS HEREBY ORDERED that enforcement of the January 24, 1989 Order, and any other proceeding in connection with matters in this action, be stayed pending the disposition of Scott F. Linde's appeal from the Court's Order.

_____
Judge Muir

Date: February , 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff vs. GLENEAGLES INVESTMENT COMPANY, INC., et al. and SCOTT F. LINDE, Party to Agreement of Sale	CIVIL NO. 80-1424 Reassigned to Judge Muir 3/5/81 (Complaint filed 12/12/80)

MOTION TO STAY

Scott F. Linde, Party to Agreement of Sale in the above-captioned action, hereby moves the Court for an Order staying enforcement of the Order entered by this Court on January 24, 1989, and any other proceedings in connection with matters in this action, pending the disposition of Scott F. Linde's appeal from such Order to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
DILWORTH, PAXSON, KALISH
& KAUFFMAN

Thomas I. Vanaskie

Thomas I. Vanaskie, Esq.
Elizabeth Schneider, Esq.
600 Penn Security Bank Building
Scranton, PA 18503
(717) 346-7569

Dated: February , 1989 Attorneys for Scott F. Linde

CERTIFICATE OF NON-CONCURRENCE

I, THOMAS I. VANASKIE, ESQ., hereby certify that I have been advised by Thomas P. Brennan, Esq. of Gallagher, Brennan & Gall, counsel for the Receiver, Thomas H. Kiley, and Robert Spielman, Esq.., counsel for Carrier Coal Company, that they do not concur in the Motion for Stay of Scott F. Linde.

Thomas I. Vanaskie

Dated: February 24, 1989

CERTIFICATE OF SERVICE

I, Thomas I. Vanaskie, Esq., hereby certify that I have caused to be served by first-class mail, postage prepaid, a true and correct copy of the foregoing Motion to Stay on the following persons:

Thomas P. Brennan, Esq.
Gallagher, Brennan & Gill
300 First Eastern Plaza
60 Public Square
Wilkes-Barre, PA 18701

Robert Spielman, Esq.
Rosenn, Jenkins & Greenwald
15 South Franklin Street
Wilkes-Barre, PA 18701

Thomas I. Vanaskie

DATED: February 24, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff vs. GLENEAGLES INVESTMENT COMPANY, INC., et al. and SCOTT F. LINDE, Party to Agreement of Sale	CIVIL NO. 80-1424 Reassigned to Judge Muir 3/5/81 (Complaint filed 12/12/80)

NOTICE OF APPEAL

Notice is hereby given that Scott F. Linde, Party to Agreement of Sale in the above action, hereby appeals to the United States Court of Appeals for Third Circuit from the Order entered in this action on the 24th Day of January, 1989.

Respectfully submitted,
DILWORTH, PAXSON,
KALISH & KAUFFMAN

Thomas I. Vanaskie, Esq.

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Dated: February 22, 1989 Attorneys for Scott F. Linde

2-24-89

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff vs. GLENEAGLES INVESTMENT COMPANY, INC., et al. and SCOTT F. LINDE, Party to Agreement of Sale	CIVIL NO. 80-1424 Reassigned to Judge Muir 3/5/81 (Complaint filed 12/12/80)

NOTICE OF APPEAL

Notice is hereby given that Scott F. Linde, Party to Agreement of Sale in the above action, hereby appeals to the United States Court of Appeals for Third Circuit from the Order entered in this action on the 24th Day of January, 1989, and the Court's denial of Linde's Motion for Reconsideration of March 7, 1989.

Respectfully submitted,
DILWORTH, PAXSON,
KALISH & KAUFFMAN

Thomas I. Vanaskie

Thomas I. Vanaskie, Esq.

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(717) 346-7569

Dated: March 10, 1989 Attorneys for Scott F. Linde

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-5157 and 89-5198

UNITED STATES OF AMERICA

Appellee

vs .

TABOR COURT REALTY

APPEAL OF SCOTT F. LINDE,
PARTY TO AGREEMENT OF SALE

Appellant

Appeal From The Order Entered On January 24, 1989
By The United States District Court For The Middle
District Of Pennsylvania In C.A. No. 80-1424

BRIEF OF APPELLANT

DILWORTH, PAXSON, KALISH &
KAUFFMAN

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Elizabeth Schneider

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HOURIGAN, KLUGER, SPOHRER
QUINN, P.C.

George A. Spohrer, Esq..

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Attorneys for Appellant
Scott F. Linde

property that could not be used or developed for a considerable period of time.

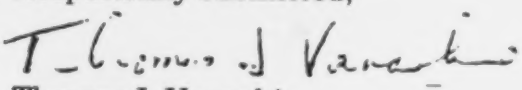
The terms of the Assignment plainly indicate that Carrier Coal elected to pursue a contractual arrangement with Linde as opposed to participating in the bidding process. Carrier Coal recognized that the Assignment was subject to district court approval. (App. 19-20a) The Assignment would be rendered null and void if not approved by the district court. (Id.) Thus, Carrier assumed the risk of disapproval when it elected not to bid. The Assignment did not preclude Carrier Coal from bidding, and Linde should not be penalized for Carrier Coal's decision to pursue a negotiated resolution with Linde as opposed to participating in a bidding process. Thus, the district court's evisceral disapproval of the Assignment did not provide a basis upon which to refuse confirmation of the sale to Linde.

Linde entered into the Agreement of Sale in good faith with the Receiver expecting that unless a written bid of at least 110% of his offer was received, the Trustee would convey the subject property to him. In order to deal with the leasehold interest of Carrier Coal over a large portion of the subject premises, Linde entered into an assignment of his interests to Carrier Coal. Linde was compensated therein for his time, expense and risk in connection with the Agreement of Sale. The

VIII. CONCLUSION

Linde respectfully requests that this Court reverse the January 24, 1989 Order of the district court and direct the specific enforcement of the Agreement of Sale between Linde and the Receiver.

Respectfully submitted,



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Attorneys for Appellant
Scott F. Linde

DATED: April 17 , 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-5157 and 89-5198

UNITED STATES OF AMERICA

Appellee
vs .
TABOR COURT REALTY

APPEAL OF SCOTT F. LINDE,
PARTY TO AGREEMENT OF SALE

Appellant

Appeal From The Order Entered On January 24, 1989
By The United States District Court For The Middle
District Of Pennsylvania In C.A. No. 80-1424

REPLY BRIEF OF APPELLANT

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process was not tainted by fraud, unfairness or mistake")(emphasis added); Zalevsky v. Steele, 78 Bankr. 100, 102 (W.D. Pa. 1987)(recognizing "the longstanding guiding words of the Court of Appeals for the Third Circuit" in Stanley Engineering). In short, "once the process of solicitation of more attractive bids has been completed, the sale to the best bid resulting from this process should ordinarily be final." In Re: Joshua Slocum, Ltd., 1989 Bankr. LEXIS 609 (Bankr. E.D. Pa. 1989)(emphasis added).

In the matter sub judice, the process of soliciting bids did not result in a more attractive offer than that submitted by Linde. Thus, even if Linde did not have the right to assign his interests to Carrier, the district court was obligated to confirm the sale to Linde because the Receiver did not establish gross inadequacy of sale price, fraud, mistake, or other similar exceptional circumstances. In Re: Superior Mushroom Growers Corp., 228 F.Supp. 372, 373 (E.D. Pa. 1964).5

Such a result is consistent with the concept of finality of judicial sales "clearly supported by this Circuit." _____

5 Carrier Coal recognized that the assignment was subject to district court approval. By not submitting a bid, it thus assumed the risk of non-approval. The consequence of disapproval of the assignment does not warrant re-opening the bidding process. Instead, sale to Linde should be confirmed. Indeed, Linde should not be penalized for Carrier Coal's decision to enter into the Assignment rather than participating in the bid process.

III. CONCLUSION

Linde had a clear contractual right to assign his interests under the Agreement of Sale to Carrier Coal. This right cannot be extinguished by parol evidence of some other "oral understanding." Nor can this right be denied on grounds that the assignment to Carrier Coal violated public policy. The district court's disapproval of the assignment is thus without legal foundation.

Even if the district court had a basis for disapproval of the assignment, it could only refuse to confirm the sale to Linde upon a showing of gross inadequacy of sale price, fraud, mistake, or other similar exceptional circumstances. The district court failed to apply the appropriate standard of review. Moreover, the evidence did not rise to a level necessary to justify a refusal to confirm the sale. Accordingly, Linde respectfully requests that this Court reverse the January 24, 1989 Order of the district court and direct the specific performance of the Agreement of Sale between Linde and the Receiver.

STATEMENT OF SCOTT F. LINDE

To All in attendance at the Public Sale of certain unimproved lands of Raymond Colliery Co., Inc., and its subsidiaries which are subject to an Agreement of Sale dated May 20, 1988 between Thomas H. Kiley, Receiver for Raymond Colliery Co., Inc., and its subsidiaries, on the one hand, and Scott F. Linde or his assigns, on the other:

Scott F. Linde, and his assign under the Agreement of Sale of May 20, 1988, Lackawanna Land and Energy, Inc., object to this public sale on the following grounds:

First, Scott F. Linde claims an entitlement to specific performance of the Agreement of Sale of May 20, 1988, without further bidding. The lands subject to the Agreement of Sale were subject to a public sale conducted by the Receiver on September 2, 1988. Since no party submitted a bid at that public sale, Scott F. Linde claims that the Receiver was obligated to seek final confirmation from the United States District Court for the Middle District of Pennsylvania to complete the sale of the lands in question in accordance with the Agreement of Sale. The question of whether Scott F. Linde is entitled to purchase the lands in question in accordance with the terms of the May 20, 1988 Agreement of Sale is presently before the United States Court of Appeals for the Third Circuit. If Scott F. Linde prevails on that appeal, he and his assign, Lackawanna Land and Energy, Inc., will seek specific performance of that Agreement of Sale. The successful bidder at this public sale is subject to losing any interests in the properties in question in the event that Scott F. Linde's appeal is successful.

Second, Scott F. Linde and his assign, Lackawanna Land and Energy, Inc., contend that the procedures for this public sale as set forth in the Legal Advertisement published by the Receiver are defective. There is no maximum time for a party to respond to a bid, thus creating the possibility that the bidding may remain open for an unreasonably long time awaiting a bid. In addition, there are no pre-qualification requirements of any bidder, thus creating the possibility for sham bidding.

For these reasons, Scott F. Linde and his assign, Lackawanna Land and Energy, Inc., object to the conduct of this Public Sale. If Scott F. Linde or his assign, Lackawanna Land and Energy, Inc., participate in this Public Sale, each will do so under protest and without waiver of the foregoing objections and any other challenges available to them with respect to this Public Sale.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5157 and 89-5198

UNITED STATES OF AMERICA,

Appellee

TABOR COURT REALTY, ET AL

APPEAL OF SCOTT F. LINDE,
PARTY TO AGREEMENT: OF SALE,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil. No. 80-1424)

Argued on July 10, 1989

Before: HIGGINBOTHAM, BECKER and NYGAARD,
Circuit Judges

(Opinion Filed: OCT 12 1989)

Thomas I. Vanaskie, Esq. (Argued)
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Attorney for Appellee

Robert Spielman, Esq. (Argued)
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Attorney for Appellee

Thomas P. Brennan (Argued)
Christine E. McLaughlin, Esq.
Gallagher, Brennan & Gill
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Attorney for Appellee

D. Alan Harris, Esq.
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Chicago, Illinois 60614
Attorney for Appellee

OPINION OF THE COURT

NYGAARD, Circuit Judge.

There are two questions before the court in this case, each concerning the judicial sale of real estate. The first issue is whether an assignment clause in a real estate sales contract previously approved by the court may be set aside if the buyer assigns a portion of the property to a potential bidding competitor. The second issue is whether the district court abused its discretion when it refused to confirm the judicial sale upon a finding that the prices is inadequate.

We conclude that unless there was collusion, fraud, unfairness or mistake in the conduct of sale, or the price brought at the sale was so grossly inadequate as to shock the conscience of the court and raise a presumption of fraud, unfairness or mistake, that neither inadequacy of the purchase price nor the assignment is sufficient reason for the district court to set aside the assignment or to refuse final court approval of the sale. The district court concluded that the assignment stifled bidding competition and that the price was inadequate. He rejected the partial assignment and refused to confirm the judicial sale. Because the district court erred by invalidating the sale without reaching the issue of whether or not there was collusion, we will reverse and remand the matter to the district court with instructions to either enter an order confirming the sale from the Receiver to appellant, or alternatively to conduct a further hearing to determine if there was any collusion in the conduct of the sale.

On March 26, 1985, the district court ordered the foreclosure of properties of Raymond Colliery Company Incorporated and its subsidiaries by an officer of the court pursuant to 28 U.S.C. §§ 2001, 2002, and 2004, and 26 U.S.C. §7403(d) to satisfy the liens of creditors of the Raymond group. On April 30, 1986, Thomas H. Kiley was appointed Receiver of the properties of the Raymond Group with authority to seek purchasers for the properties but without power to sell them except upon application to the court. The property was appraised by the Receiver, and valued at $1,283,294. It contains approximately 652 acres of land located in Lackawanna County, Pennsylvania along with the coal thereunder. On May 20, 1988 the Receiver entered into an agreement of sale with Scott F. Linde, appellant herein, for the sum of $1,483,00O.

The original draft of the agreement of sale to appellant included a paragraph which prohibited any assignment by appellant without the written consent of the Receiver. Appellant requested that the paragraph prohibiting assignment be deleted and the buyer be designated as "Scott F. Linde or his assigns." The Receiver agreed, and each party executed the contract.

The Receiver then filed a motion for authority to sell the land and coal pursuant to the agreement of sale with appellant. On August 8, 1988, the district court approved the sale of the land and coal to appellant subject to publication once a week for three weeks in a newspaper of general jurisdiction in Lackawanna County, the opportunity for others to submit higher bids, and final confirmation of the sale by the court.

On September 2, 1988, appellant arrived at the Receiver's office, and met with representatives of Carrier Coal Enterprises, a potential bidding competitor.

Shortly thereafter they advised the Receiver that appellant would be assigning his rights under the agreement of sale to Carrier and that Carrier would not be submitting a bid to the Receiver. On September 9, 1988, appellant delivered a copy of the assignment to the Receiver. It was signed on September 2, 1988. Carrier paid the sum of $200,000 to Linde in consideration for the assignment, and conveyed to him one of the seven parcels of land.

Counsel for the Receiver responded by informing both appellant and his assignee that an assignment to a competitive purchaser was improper. The Receiver drew $148,300 upon the letter of credit which appellant had provided as security for faithful performance under the agreement of sale. The Receiver is now holding this money.

On November 21, 1988, the Receiver filed a "Motion to Impose Remedies for Unlawful Interference with Court Directed Sale of Real Property," claiming that appellant did not have the right to assign any interest in the agreement of sale to a potential bidding competitor and, that the assignment therefore constituted an unlawful interference with the bidding process. By order dated January 9, 1989, the district court concluded that "the language used in the agreement of sale would appear not to prohibit Linde from assigning his interest in any manner that he chooses." He scheduled a hearing to be held on January 18, 1989 "on the question of collusion" in the bidding process. On January 24, 1989, the district court, without addressing the issue of collusion, disapproved of the assignment between appellant and Carrier Coal; ordered the remainder of the agreement of sale to remain in full force and effect; and directed the Receiver

to reopen the bidding process. In reaching this decision, the district court declined to resolve the question of collusion but merely concluded "the Receiver was deprived of Carrier's bid because of the assignment agreement between C. rier Coal and Linde."

Our standard of review on the trial court's findings of fact is whether he committed clear error. In re Abbott's Dairies of Pennsylvania. Inc., 788 F.2d 143, 147 (3d Cir. 1986). Whether the district court erred when it refused to confirm the agreement of sale is based upon whether it abused its discretion. U.S. v. Branch Coal Corp., 390 F.2d 7 (3d Cir. 1968).

When reviewing a contract, a court must first look to the writing itself and determine whether its terms are clear and precise. If they are, performance of the express terms of the agreement is required. It is basic contract law that when parties negotiate an agreement and reduce their understanding to a writing, a court need look no further than the writing itself to ascertain the meaning of the agreement, unless the writing is ambiguous. Brokers Title Company v. St. Paul Fire and Marine Insurance Co., 610 F.2d 1174, 1178 (3d Cir. 1979); Giant Supermarkets. Inc. v. Siama Marketing Systems. Inc., 313 Pa.Super. 115, 459 A.2d 765 (1983). When an agreement or provision thereof is clear on its fact and is not reasonable capable of differing

interpretations, the intent of the parties must be ascertained from the writing itself. The parol evidence rule bars the efforts by a party to create an ambiguity by parol evidence where the agreement is not ambiguous on its face. In order to find ambiguity in an agreement, the document must be reasonably capable of two interpretations. Stern v. Vic Snyder. Inc., 325 Pa.Super. 423, 473 A.2d 139 (1984); Merriam v. Cedarbrook Realty. Inc., 266 Pa.Super. 252, 404 A.2d 398 (1978).

The district court initially concluded in his January 9, 1989 order that "... the language used in the agreement of sale would appear not to prohibit Linde from assigning his interests in any manner that he chooses." Nevertheless, at the January 19, 1989 hearing the court, contrary to its earlier conclusion, and because it did not know whether the words "his assigns" were "words of purchase or words of limitation or what," held that "... I don't know what the words mean, or his assigns ... I think it's completely ambiguous and I'll overrule the objection to that." Upon its finding that "or his assigns" was ambiguous language in the contract, the court permitted testimony by the Receiver as to understandings he had and representations which were made by Mr. Linde prior to or contemporaneous with the execution of the agreement of sale. We find that it was error for the district court to permit such testimony. We conclude that the term "Scott F. Linde or his assigns" is clear and unambiguous and specifically enforceable as

a matter of basic contract law. Carlock v. National Co-operative Refinery Assoc., 424 F.2d 148 (10th Cir. 1970); Kountze v. Kirby Lumber Corp., 153 F.2d 695 (5th Cir. 1946); Truver v. Kennedy, 424 PA 294, 229 A.2d 468 (1967). The function of the court is to enforce and not rewrite those agreements entered into knowingly and freely by sophisticated parties. Philadelphia v. Liberman, 112 F.2d 424 (3rd Cir.), cert denied 311 U.S. 679 (1940). [1]

III.

Appellant argues that it was an abuse of the trial court's discretion to disapprove the assignment from Linde to Carrier Coal of rights contained in the Agreement of Sale executed between Linde and the Receiver after approving the precise language which specifically permits it. The Receiver counters that since Carrier might be a competing bidder, the assignment frustrates the process which is intended to test the adequacy of the purchase price. This may or may not be true.[2] At all events, we fail to understand its significance when it is self-evident that one who is interested in purchasing the property by assignment would likewise be interested in bidding on it. This is an expected consequence of the agreement to which appelle subscribed. Both appellant

1. Even if this clause is, as we find it to be, unambiguous, we recognize that this parol evidence would have been admissible to establish fraud in the inducement. The parol evidence rule was designed to prevent fraud not promote it by shielding a parties' fraudulent misrepresentation from attack. 9 Wigmore, evidence §2439, p. 128.

2. It was conceded at oral argument that a protocol prohibiting assignment would generally lower the price received at a public sale.

and the Receiver are apparently experienced in business and real estate transactions. The parties herein negotiated the contractual right to assign the agreement of sale. The alleged frustration of the bid process by assigning the Agreement of Sale is insufficient reason to invalidate the assignment absent a finding of fraud or collusion.

In **In re Abbott's Dairies of Pennsylvania. Incorporated**, 788 F.2d 143, 147 (3d Cir. 1986) we held in an analogous situation, that to invalidate a completed sale of the bankrupt estate generally requires a showing of "fraud, collusion ... or an attempt to take grossly unfair advantage of other bidders." **See also In re Rock Industries Machinery Corporation**, 572 F.2d 1195, 1198 (7th Cir. 1978). In **re Stanley Engineering Corp.**, 164 F.2d 316, 318 (3d Cir. 1947) **cert. denied sub nom., Root v. Galman**, 332 U.S. 847, (1948), we held that bankruptcy sales made upon due notice and in accordance with the law will be confirmed unless there was fraud, unfairness or mistake in conduct in the sale, or the price was so grossly inadequate as to shock the conscience of the court and raise a presumption of fraud, unfairness or mistake. "Mere inadequacy of the price is not a sufficient ground for setting aside a judicial sale where there was no unfairness in the conduct of the sale ... where the bankruptcy court fails to confirm a judicial sale in the absence of unfairness, fraud, or mistake or gross inadequacy in price, its action will be reversed on the ground of abuse of its legal

discretion." In re Stanley at 318. Finally, in affirming a decision of the district court of the Virgin Islands, which confirmed a judicial sale, Judge Seitz said, "Our conclusion supported by a strong policy in the circuit in favor of confirming judicial sales in the absence of fraud or other similar exceptional circumstances." Villanueva et al v. Daniel, 512 F.2d 308 (3d Cir. 1974) (Citing, In re Stanley Engineering Company, supra, and Guarantee Trust Company of York v. Williamsport Wire Rope Co., 26 F. Supp. 634 (M.D. F aff'd sub. nom. Comstedt v. Gilmore, 96 F.2d 766 (3d Cir. 1).

We find Stanley Engineering Corp. and Villanueva Daniel to be controlling. The court below did not find collusion between appellant and Carrier. Indeed, it erroneously stated "we need not decide here whether there was actual collusion between Carrier and Linde to depress the price paid for those properties." The order of the court was predicated on two principal findings: first, "that no bids were submitted or September 2, 1988, and second, that the evidence presented indicates that the purchase price in the agreement of sale was inadequate." In determining whether a gross inadequacy in the purchase price exists, the court must take into consideration appraisement of the property as a guide in the exercise of discretion. Id. "Traditionally, courts have held that [f]air and valuable consideration is given in a bankruptcy sale when the purchaser pays 75% of the appraised value of the assests. "3 In re Abbott's Dairies, quoting In re Rock Indus. Machn Corp., 572F.2d 1195, 1197 n.l. (7th Cir. 1978). The purchase price herein was $200,000 greater than the highest appraisal value of the property.

There are neither facts nor findings which would indicate any fraud or collusion, in the conduct of sale, or that the sale was so grossly inadequate as to shock the conscience of the court. By the court's own words, it is the inadequacy of the price and the lack of any competitive bid upon which it bases its decision to deny confirmation. We find that to deny confirmation on this basis was an abuse of the court's discretion.4

IV.

Accordingly, the district court's order of January 24, 1989 will be reversed and the matter remanded to the district court with instructions to either enter an order confirming the sale from the Receiver to appellant or alternatively to conduct a further hearing to determine if there was any collusion in the conduct of the sale.

3. With respect to Judicial Sales, 28 U.S.C. 5 2001(b) provides that "... No private sale shall be confirmed at a price less than two-thirds its appraised value."

4. Appellant also claims that the district court erred when it failed to give the parties adequate notice of the actual scope of the hearing, or of the issue upon which the confirmation of the agreement was to be decided. Inasmuch as we are remanding the matter for either confirmation of the sale or a hearing on the issue of collusion, we do not reach this question.

TO THE CLERK:
Please file the foregoing not-for-publication opinion.

Circuit Judge

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October 17, 1989

MRS SALLY MRVOS, CLERK
OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET ST, PHILADELPHIA PA 19106-1790

RE: United States of America v. Tabor Court Realty, et al., Appeal of Scott F. Linde, Party to Agreement of Sale Appellant

Nos. 89-5157 and 89-5198

Dear Mrs. Mrvos:

This firm represents Carrier Coal Enterprises ("Carrier"). On behalf of Carrier, we are writing to you in connection with the opinion which was filed in the above-captioned matter on October 12, 1989.

One of the issues before the Court was "...whether an assignment clause in a real estate sales contract previously approved by the Court may be set aside if the buyer assigns a portion of the property to a potential bidding competitor." (Opinion, at pp. 2-3). Carrier was the "potential bidding competitor" to whom Scott F. Linde, the appellant ("Linde") had assigned his rights under an agreement of sale between Linde and the Receiver of Raymond Colliery Co., Inc.

In its Opinion, the Third Circuit stated that "...unless there was collusion, fraud, unfairness or mistake in

the conduct of [the] sale, or the price brought at the sale was so grossly inadequate as to shock the conscience of the court and raise a presumption of fraud, accident, or mistake, that neither inadequacy of the purchase price nor the assignment is sufficient reason for the district court to set aside the assignment or to refuse final court approval of the sale. (Emphasis added). (Opinion, at p. 3). However, the Third Circuit then stated that the matter should be remanded to the district court with instructions either to conduct a hearing to determine if any collusion had occurred in the conduct of the sale, or, in the alternative, to "...enter an order confirming the sale from the Receiver to appellant." (Emphasis added). (Opinion, at p. 3).

We believe that the Third Circuit intended to state: "from the Receiver to appellant's assignee." Otherwise, the Third Circuit would be ordering the trial court to do previously what the Third Circuit, earlier in its Opinion, has said cannot be done, i.e., the trial court would be compelled to nullify the assignment, even in the absence of any finding of collusion, fraud, mistake, or grossly inadequate price.

We believe, accordingly, that there is a typographical or other inadvertent error in the portion of the Opinion which describes the instructions to the district court. We respectfully request that you bring this mater to the attention of the Court, so that it can be resolved without the necessity for a request for rehearing. Thank you.

ROSENN, JENKINS & GREENWALD
BY: ROBERT SPIELMAN
Attorneys for Carrier Coal Enterprises
15 South Franklin Street
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(717) 826-5600

RS:gr
FEDERAL EXPRESS
cc: Thomas I. Vanaskie, Esq., Thomas P. Brennan, Esq.

October 18, 1989

Sally Mrvos, Clerk
Office of the Clerk
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for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: United States of America v. Tabor Court Realty, et al., Appeal of Scott F. Linde, Party to Agreement of Sale, Appellant
Nos. 89-5157 and 89-5198

Dear Ms. Mrvos:

This firm represents Scott F. Linde, the Appellant in the above-referenced matter. We are writing in response to the letter of Robert Spielman, counsel for Carrier Coal Enterprises, addressed to you under date of October 17, 1989.

In his letter, Mr. Spielman suggests that the Opinion of the Court filed on October 12, 1989 in the above-referenced matter inadvertently indicated that, on remand, the trial court had as an option the entry of an order confirming the sale of certain real estate from a court-appointed receiver to "appellant," rather than "appellant's assignee," Carrier Coal. Contrary to the view expressed by Mr. Spielman, we do not believe that the Court "inadvertently" directed as an alternative on remand the confirmation of the sale to appellant.

What Mr. Spielman has neglected to mention in his letter is the fact that Carrier Coal did not appeal the district court's ruling. Thus, the Third Circuit could not

suggestentering an order in favor of a party which elected not to challenge the district court's ruling. Indeed, the enforceability of the Assignment as between Carrier Coal and Linde under the presently existing circumstances is a matter that was not before the Third Circuit.

Moreover, there is nothing inconsistent with the Third Circuit analysis that the Assignment failed to provide a basis in and of itself to require a second bidding process and its conclusion that, on remand, the district court may confirm the sale to Appellant, and not the Appellant's assignee. In fact, the Brief of Appellant specifically argued that the district court's disapproval of the Assignment did not preclude confirmation of the sale to Appellant, explaining:

> The terms of the Assignment plainly indicated that Carrier Coal elected to pursue a contractual arrangement with [Appellant] as opposed to participating in the bidding process. Carrier Coal recognized that the Assignment was subject to district court approval. The Assignment would be rendered null and void if not approved by the district court. Thus, Carrier assumed the risk of disapproval when it elected not to bid. The Assignment did not preclude Carrier Coal from bidding, and [Appellant] should not be penalized for Carrier Coal's decision to pursue a negotiated resolution with [Appellant] as opposed to participating in a bidding process. Thus, the district court's evisceral disapproval of the Assignment did not provide a basis upon which to refuse confirmation of the sale to [Appellant]. [Brief of Appellant at 31; emphasis added.]

Appellant repeated this argument in its Reply Brief, stating:

Carrier Coal recognized that the Assignment was subject to district court approval. By not submitting a bid, it thus assumed the risk of non-approval. The consequence of disapproval of the Assignment does not warrant re-opening the bidding process. Instead, sale to [Appellant] should be confirmed. Indeed, [Appellant] should not be penalized for Carrier Coal's decision to enter into the Assignment rather than participating in the bid process. [Reply Brief at 15, n.5; emphasis added.]

It is evident that there is no typographical or other inadvertent error in this Court's instructions to the district court. There is thus no need for any amendment of the Court's Opinion.

Moreover, the type of amendment proposed by Carrier Coal is substantive, and not clerical. Accordingly, it can be considered only through a Petition for Rehearing.

Thank you for bringing this matter to the attention of the Court.

Sincerely yours,

Thomas I. Vanaskie

TIV/dk
cc: Thomas P. Brennan, Esq.
Robert Spielman, Esq.
George A. Spohrer, Esq.
bcc: Scott F. Linde

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-5157 and 89-5198

UNITED STATES OF AMERICA

Appellee

vs.

TABOR COURT REALTY

APPEAL OF SCOTT F. LINDE,
PARTY TO AGREEMENT OF SALE

Appellant

Appeal From the Order Entered On January 24, 1989
By The United States District Court For The Middle
District of Pennsylvania in C.A. No. 80-1424

PETITION FOR PANEL REHEARING

Comes Now, Carrier Coal Enterprises ("Carrier"), by its attorneys, Rosenn, Jenkins & Greenwald, and petitions for a panel rehearing of the matter decided in the above-captioned case, through an opinion filed October 12, 1989("Opinion"), and in support thereof, avers the following:

1. The Opinion states that the assignment agreement ("Assignment") between Scott F. Linde ("Linde") and Carrier should not be set aside, absent a finding of collusion by the district court.

2. However, the Opinion also states that the district court will be provided with the alternative of "...confirming the sale from the Receiver to appellant [i.e., Linde]." Opinion, at p. 3.

3. However, if the district court confirms the sale to Linde, the Assignment will be rendered invalid and unenforceable.

4. The holdings and views expressed in the body of the Opinion are clearly in conflict with the instructions to the district court.

5. The instructions to the district court should be amended to provide the district court with the alternative of confirming the sale from the Receiver to appellant's assignee, Carrier.

Wherefore, Carrier prays that its petition for rehearing be granted, and that the court thereafter amend its instructions to the district court, so as to provide the district court with the alternative of confirming the sale from the Receiver to appellant's assignee, Carrier.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-5157 and 89-5198

UNITED STATES OF AMERICA
Appellee

vs .
TABOR C0URT REALTY

APPEAL OF SCOTT F. LINDE,
PARTY TO AGREEMENT OF SALE
Appellant

Appeal From the Order Entered On January 24, 1989
By The United States District Court For The Middle
District of Pennsylvania In C.A. No. 80-1424

MEMORANDUM IN SUPPORT OF PETITION FOR PANEL REHEARING

FACTS

In its Opinion of October 12, 1989 ("Opinion"), a copy of which is attached as Exhibit A, the Third Circuit considered the issue of "...whether an assignment clause in a real estate sales contract previously approved by the court may be set aside if the buyer assigns a portion of the property to a potential bidding competitor." (Opinion at pp. 2-3). Carrier was the "potential bidding "competitor" to whom Scott F. Linde, the appellant ("Linde"), had partially assigned his rights under an agreement of sale between Linde and the Receiver of Raymond Colliery Co., Inc. ("Receiver"). The district court had concluded that the partial assignment between Linde and Carrier ("Assignment") stifled competitive bidding. As a result, the district court rejected the Assignment, and refused to confirm the judicial sale. Linde then appealed.

On appeal, the Third Circuit reversed the district court and held, inter alia, that "...unless there was collusion, fraud, unfairness, or mistake in the conduct of [the] sale, or the price brought at the sale was so grossly inadequate as to shock the conscience of the court and raise a presumption of fraud, accident, or mistake, that neither inadequacy of the purchase price nor the assignment is sufficient reason for the district court to set aside the assignment or to refuse final court approval of the sale." (Emphasis added) (Opinion at p. 3). Accordingly, the Third Circuit concluded that the district court had "...erred by invalidating the sale without reaching the issue of whether or not there was collusion." The Third Circuit then remanded the matter to the district court, with instructions either "...to conduct a further hearing to determine if there was any collusion in the conduct of the sale..." or, in the alternative, "...to enter an order confirming the sale from the Receiver to appellant [i.e., Linde]." (Emphasis added) (Opinion, at p. 3).

Carrier believes that the Third Circuit intended to state: "to enter an order confirming the sale from the Receiver to appellant's assignee." Otherwise, the Third Circuit would be ordering the district court to do precisely what the Third Circuit, earlier in its Opinion, had said cannot be done, i.e., the district court would be compelled to treat the assignment as a nullity, even in the absence of any finding of collusion, fraud, unfairness or mistake, or grossly inadequate price.

Carrier also believes, accordingly, that there is a typographical or other inadvertent error in the portion of the opinion which describes the instructions to the district court. Carrier initially brought this matter to the attention of the Third Circuit's Clerk, through a letter dated October 17, 1989. A copy of Carrier's letter is attached as Exhibit B.

Linde responded to Carrier's letter by sending the Clerk a letter of his own, dated October 18, 1989. A copy of Linde's letter is attached as Exhibit C. Linde's letter contends, implicitly, that the Assignment between Carrier and Linde should be ignored, and that the Third Circuit in fact intended to direct the district court to treat the Assignment as a nullity, whether or not the district court found collusion, fraud, unfairness, or mistake, or a grossly inadequate price. This request by Carrier for a panel hearing then followed.

ISSUE

Should the district court be instructed to set aside the Assignment, even in the absence of a finding of collusion, fraud, unfairness, mistake, or a grossly inadequate price?

DISCUSSION

In its Opinion, the Third Circuit clearly and explicitly holds that the Assignment is valid and enforceable, absent a finding of collusion. For example, on p. 3, the Opinion states: "...neither inadequacy of the purchase price nor the assignment is sufficient reason... to set aside the assignment...".

Again, on p. 7, the Third Circuit states: "We conclude that the term 'Scott F. Linde or his assigns' is clear and unambiguous and specifically enforceable as a matter of basic contract law." Additionally, on p. 9, the Third Circuit states: "[t]he alleged frustration of the bid process by assigning the Agreement of Sale is insufficient reason to invalidate the assignment absent a finding of fraud or collusion." (Emphasis added).

Inexplicably, however, in its instructions to the district court, the Third Circuit provides the district court with the alternative of "...confirming the sale from the Receiver to appellant [i.e. Linde]." Confirming the sale to Linde, not to Carrier, implicitly invalidates the assignment. The instructions to the district court are thus clearly and directly in conflict with the holdings set forth elsewhere in the Opinion. Since there is no conceivably rational way to reconcile the instructions to the district court with the views expressed in the remainder of the Opinion, Carrier thus suggests that the instructions to the district court contain a typographical or other inadvertent error. Carrier believes that the Third Circuit clearly intended to state that the district court, absent a finding of fraud, could direct a conveyance to appellant's assignee, Carrier. No other result makes any logical sense, nor does any other result conform with the views and holdings set forth in the body of the Opinion.

In his letter to the Clerk, Linde argues in favor of a conveyance to Linde; but Linde's arguments are clearly specious. First, Linde maintains that the Third Circuit could not have directed a conveyance to Carrier because Carrier "...elected not to challenge the district court's ruling." This novel proposition is totally bereft of case law support. Carrier's formal role, or

lack of it, in the appellate process had nothing whatever to do with the scope of the relief that the Third Circuit was empowered to grant, when confronted with Linde's appeal of the district court's ruling. Although Carrier declined to join in Linde's appeal, that fact does not somehow magically mean that the assignment between Linde and Carrier was terminated.

In addition, Linde maintains that the enforceability of the assignment between Linde and Carrier was "...a matter that was not before the Third Circuit." (Emphasis original). To the contrary, the district court's decision to set aside the assignment, in the absence of a finding of collusion, was the precise issue which confronted the Third Circuit.

Finally, Linde points to the various arguments, set forth in his brief and reply brief, in which he addressed the issue of whether the sale to Linde should be confirmed even if the assignment agreement were invalidated. But the assignment has not been invalidated. To the contrary, the Third Circuit has clearly held that the assignment cannot be set aside in the absence of a finding of collusion.

CONCLUSION

The Third Circuit's instructions to the district court should be clarified in a manner which is consistent with the holdings and views set forth in the body of the Opinion, and the district court should be instructed to direct a conveyance from the Receiver to Linde's assignee, Carrier, in the absence of the finding by the district court of any collusion.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-5157 and 89-5198

UNITED STATES OF AMERICA
Appellee
v s .
TABOR COURT REALTY

APPEAL OF SCOTT F. LINDE,
PARTY TO AGREEMENT OF SALE
Appellant

Appeal From The Order Entered On January 24, 1989
By The United States District Court For The Middle
District Of Pennsylvania In C.A. No. 80-1424

ANSWER AND MEMORANDUM IN OPPOSITION TO PETITION FOR PANEL REHEARING

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ANSWER TO PETITION FOR PANEL REHEARING

NOW COMES SCOTT F. LINDE ("Linde"), by and through his attorneys, Dilworth, Paxson, Kalish & Kauffman, and makes the following Answer to the Petition for Panel Rehearing concerning the effect of this Court's Opinion of October 12, 1989, and responds to the individual paragraphs of the Petition for Panel Rehearing as follows:1

1. Denied as stated. This Court's Opinion of October 12, 1989, also, in pertinent part, states that the Assignment is not "sufficient reason for the district court . . . to refuse final court approval of the sale." (October 12, 1989 Opinion at p. 3; emphasis added.) This Court also identified as an issue before it "[w]hether the district court erred when it refused to confirm the Agreement of Sale. . . ." (October 12, 1989 Opinion at p. 6; emphasis added.)

The issues presented for review by Linde, who was the only appellant, included whether the district court had erred "in failing to enforce the terms of an Agreement of Sale between...Linde and a court-appointed

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1 Linde recognizes that the form used by Carrier, submitting a "petition" in numbered paragraphs along with a Memorandum of Law, is inconsistent with the provisions of Fed.R.App.P. 32(b) and Third Circuit Court Rule 21(2)(B). So that the failure to respond to the numbered paragraphs of Carrier's petition is not construed as an admission, however, Linde follows the format employed by Carrier.

receiver on the basis of Linde's assignment of his interest . . .", and whether "the district court abuse[d] its discretion in refusing to confirm the Agreement of Sale when Linde was a good faith purchaser paying fair value." (Brief of Appellant at 1, 2; emphasis added.) In the Conclusion to the Brief for Appellant, in which an appellant is to state the precise relief sought, Third Circuit Court Rule 21(1)(A)(j), Linde requested that "this Court reverse the January 24, 1989 Order of the district court and direct the specific enforcement of the Agreement of Sale between Linde and the Receiver." (Brief for Appellant at 37; emphasis added.) This identical relief was requested in the conclusion to Linde's Reply Brief. (Reply Brief of Appellant at 22.)

By way of further answer, after Carrier Coal Enterprises ("Carrier") failed to timely appeal, Linde executed a second assignment of his interests under the Agreement of Sale, this time to Lackawanna Land & Energy, Inc., for additional support in prosecuting this appeal. In addition, Carrier accepted the return of the sum of $200,000 which had been paid in escrow upon the execution of the Assignment. This refund was consistent with the terms of the Assignment, which provided that if the district court disapproved the Assignment, "all monies paid pursuant to this Agreement shall be returned to Assignee and the parties released from further liability under this Agreement."
(App. 20a; emphasis added.)

2. Admitted. By way of further response, the alternative relief directed by this Court was completely consistent with the relief requested by Linde in the briefs filed with this Court. Since Carrier had not appealed, it could not be awarded relief.

3. Denied. Carrier's right to enforce the Assignment was defeated by its failure to appeal the district court's disapproval of the Assignment. Moreover, Carrier signified that the Assignment was no longer valid and enforceable by its demand and acceptance of a return of the deposit made under the Assignment. In any event, the continuing validity of the Assignment as between Linde and Carrier was not before this Court.

4. Denied. As explained in more detail in the Memorandum of Law following this formal "Answer" to Carrier's petition, the holdings and views expressed in the body of this Court's Opinion do not conflict with the instructions to the district court. The issue before this Court was whether Linde's conduct in assigning a portion of the property that was the subject of the Agreement of Sale provided a proper basis for refusing to confirm the sale to Linde. In addressing this issue, it was necessary for this Court to determine whether Linde had the right to assign as well as whether the act of assignment established a basis for the district court's actions. It was not necessary for this Court to decide whether the Assignment, which was expressly made contingent upon "obtaining approval of the court for the United States District Court of the Middle District of Pennsylvania..." (App 19a), remained a valid and binding agreement as between Linde and Carrier. Moreover, as indicated by the authority cited in the accompanying Memorandum, Carrier's failure to appeal precludes it from obtaining relief in this Court.

5. Denied. For the reasons set forth above and more fully expressed in the accompanying Memorandum of Law, the instructions to the district court should not be amended.

WHEREFORE, Linde prays that the Petition for Panel Rehearing be denied due to the fact that, in light of all the circumstance, the body of this Court's Opinion is logically consistent with the directions this Court provided the district court on remand and, in any event, relief could not be awarded the non-appealing Carrier Coal Enterprises.

MEMORANDUM IN OPPOSITION TO PETITION FOR PANEL REHEARING

PRELIMINARY STATEMENT

There are two fundamental reasons why the Petition for Rehearing of Carrier Coal Enterprises ("Carrier") must be denied. First, there is no logical inconsistency between this court's finding that Linde's Assignment of his interest under an Agreement of Sale with a court-appointed Receiver was not a proper basis for setting aside a duly held judicial sale and this Court's ruling that, on remand, the district court may confirm the sale to Linde, as opposed to Carrier, Linde's original assignee. The question before this Court was whether the results of the judicial sale should be set aside as a result of the Assignment, and not whether the Assignment remains a valid and binding agreement in light of developments that occurred after the district court's ruling of January 24, 1989. In other words, since the act of assignment did not warrant setting aside the judicial sale and if the Assignment is no longer valid, then the only sustainable result is that sale of the property in question be confirmed to Linde.

Second, Carrier's failure to appeal the district court's Order precludes it from asking this Court to enter relief in its favor. Contrary to Carrier's assertions, there is indeed a plethora of authority that holds that a non-appealing party may not seek to enlarge its rights beyond those determined by the non-appealed district court order. See, e.g., Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 81 L.Ed. 593, 57 S.Ct. 325 (1937) Airco Industrial Gases, Inc. v. Teamsters Health & Welfare Pension Fund, 850 F.2d 1028 (3rd Cir. 1988).

In sum, when Carrier abandoned Linde, compelling Linde to shoulder the burden of this appeal, it effectively precluded itself from obtaining relief from the district court's Order. Its subsequent action in demanding and accepting return of the down payment under the Assignment only corroborates the fact that the Assignment had become a nullity. Under these circumstances, the only relief that this Court could suggest to the district court is confirmation of the sale to Linde.

FACTS

On May 20, 1988, Scott F. Linde ("Linde") entered into an Agreement of Sale (hereinafter "Agreement") with the court-appointed Receiver, Thomas H. Kiley ("Receiver"), whereby the Receiver agreed to sell some 652 acres of land in Lackawanna County to Linde "or his assigns." The Agreement was subject to a judicial sale and to final confirmation by the district court. Subsequently, on September 2, 1988, just prior to the judicial sale, Linde agreed to a specific assignment to Carrier of part of the property under the Agreement of Sale for Carrier's Agreement to pay the Receiver the purchase price of $1,483,000 and to pay Linde the sum of $200,000.

The Assignment, drafted by counsel for Carrier, was expressly contingent "upon Assignee obtaining approval of the court of the United States District Court for the Middle Districtof Pennsylvania to the execution of the deed conveying title to[Carrier]." (App. 19a; emphasis added.) Paragraph 4 of theAssignment also provides:

> In the event that further approval of court approving the sale to Assignee [Carrier] is not obtained, then in that event, all monies paid pursuant to this Agreement shall be returned to Assignee and the parties released from further liability under this Agreement. [App. 19a-20a; emphasis added.]

The Receiver contested the Assignment as an "improper interference with the competitive bidding process," and moved to "impose remedies" against Linde and Carrier. On January 24, 1989 the United States District Court for the Middle District of Pennsylvania issued an Order which specifically disapproved the Assignment. Significantly, that same Order conditionally validated the Agreement subject to the results of a second judicial sale, which was ultimately scheduled for May 26, 1989.

Linde, believing that his conduct did not warrant the district court's sanctions and that it was contrary to law to render his rights under the Agreement subject to still another judicial sale, filed a timely Notice of Appeal from the district court order. Carrier did not elect to

appeal, although it was certainly an aggrieved party under the January 24, 1989 Order.[1] Indeed, because the lower court's order validated the Agreement of Sale while disapproving the Assignment, Carrier had arguably been placed in a worse position than Linde by the district court's Order.[2]

Carrier did adopt "in full" the brief filed by Linde.[3] However, while this appeal was pending, Carrier demanded reimbursement of the $200,000 it had furnished at the time of the Assignment. Linde promptly acceded to this request since he understood that the return of the deposit was consistent with his belief that the Assignment was now a legal nullity.

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1 In view of the fact that Carrier had effectively abandoned the Assignment by not appealing, Linde, to obtain additional support in pursuing his appeal, assigned his interests under the Agreement of Sale to Lackawanna Land & Energy, Inc.

2 Since Carrier, the Assignee, had the burden to obtain district court approval of the Assignment, and since Carrier did not appeal the district court's refusal to approve the Assignment, Linde did not seek specific performance of the Assignment on appeal. (See Brief of Appellant at p. 37.)

3 In retrospect, since Carrier had not appealed and its position in the trial court was adverse to that of the Receiver, it is doubtful that Carrier should have been permitted to participate at all in this appeal.

ARGUMENT

A. This Court's Rationale And Its Instructions To The District Court Are Not Inconsistent.

The unsound premise upon which Carrier's petition for rehearing rests is that entry of an order confirming sale to Linde is necessarily inconsistent with this Court's conclusion that Linde had the right to assign his interests under the Agreement of Sale and that the Assignment in and of itself did not warrant the district court's Order of January 24, 1989. Linde argued on appeal that his act of assignment did not preclude confirmation of the sale to Linde because Linde had the contractual right to assign and there was nothing wrongful in the act of assignment. It was thus essential for the court to address those two issues in order to award as alternative relief that which was specifically requested by Linde--confirmation of the sale to him. The inappropriate leap that Carrier makes in its argument is that the Assignment must still be regarded as in effect, notwithstanding any intervening developments, in order for this Court to reverse the lower court ruling. On the contrary, the focus of the appeal was the actions of the parties on September 2, 1988, and the continued validity of the Assignment was not and need not be presented to this Court as a prerequisite to directing the alternative relief that has been suggested.

This has consistently been Linde's position, as indicated by Linde's pointed argument to this Court that the district court's disapproval of the Assignment should not prevent confirmation of the sale to him. By way of explanation, Linde stated:

> The terms of the Assignment plainly indicated that Carrier Coal elected to pursue a contractual arrangement with Linde as opposed to participating in the bidding process. Carrier Coal recognized that the Assignment was subject to district court approval. The Assignment would be rendered null and void if not approved by the district court. Thus, Carrier assumed the risk of disapproval when it elected not to bid. The Assignment did not preclude Carrier Coal from bidding, and Linde should not be penalized for Carrier Coal's decision to pursue a negotiated resolution with Linde as opposed to participating in a bidding process. Thus, the district court's evisceral disapproval of the Assignment did not provide a basis upon which to refuse confirmation of the sale to Linde. [Appellant's Brief at p. 31; emphasis added.]

This point was reiterated in appellant's Reply Brief, in which Linde asserted:

> The consequence of disapproval of the Assignment does not warrant re-opening the bidding process. Instead, sale to Linde should be confirmed. [Reply Brief at 15, n.5; emphasis added.]

Inasmuch as the relief specifically requested by Linde was that the Third Circuit ". . . direct the specific enforcement of the Agreement of Sale between Linde and the Receiver" (Appellant's Brief at p. 37), it is hardly

suprising that this Court fashioned an Order directing that the district court afford precisely the relief sought by Linde or, in the alternative, conduct a hearing on the issue of whether there was collusion between Carrier and Linde. This relief is consistent with the Court's reasoning that the act of assignment did not provide a basis for directing a second bidding process. Indeed, since Linde was the only party to appeal the Order requiring the second judicial sale, it is clear that relief in Linde's favor alone is the appropriate alternative to be awarded by the district court.

B. Carrier Cannot Be Awarded Relief Because It Failed To Appeal The District Court's Order.

On page 4 of its Memorandum in Support of Petition for Panel Rehearing, Carrier states:

> Linde maintains that the Third Circuit could not have directed a conveyance to Carrier because Carrier " . . . elected not to challenge the District Court's ruling." This novel proposition is totally bereft of case law support.

On the contrary, it is Carrier's position that lacks any substantiating authority.

There is, in fact, clear judicial precedent which requires that a party be an appellant if that party wishes to profit from the reversal of a district court decision. The Supreme Court, per Justice Cardozo, addressed this issue in Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593 (1937).

Describing the issue in Morley, Justice Cardozo stated: "The power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal is here to be admeasured." Id. at 186. In reversing the appellate court's order directing that specific performance be decreed in favor of a non-appealing party, Justice Cardozo explained:

> [A]n appellee may urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' United States v. American Railway Express Company, 265 U.S. 425, 435. What he may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." Ibid. The rule is inveterate and certain.
>
> * * *
>
> "Where each party appeals, each may assign error, but where only one party appeals the other is bound by the decree in the court below. . . .ii [Id. at 337-338; citations omitted; emphasis added.]

The Supreme Court thus ruled that a Court of Appeals may not require a trial court to afford relief to a party below who has not itself appealed the trial court's decision. Accord, NLRB v. Internat'l Van Lines, 409 U.S. 48, 52, 93 S.Ct. 74, 34 L.Ed.2d 201 (1972); Alexander v. Cosden Pipe Line Co., 290 U.S. 484, 78 L.Ed. 452,

54 S.Ct. 292 (1934); Animal Protection Institute of America v. Hodel, 860 F.2d 920, 928 (9th Cir. 1988); Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 668 (5th Cir. 1983); United Optical Workers Union Local 408 v. Sterling Optical Co., 500 F.2d 220, 223-24 (2nd Cir. 1974). This Court has applied this rule in a number of different contexts. See, e g., Airco Industrial Gases Inc. v. Teamsters Health & Welfare Pension Fund, 850 F.2d 1028, 1034 (3rd Cir. 1988); Phillips v. Pennsylvania Higher Education Assistance Agency, 657 F.2d 554, 567 (3rd Cir. 1981), cert. denied, 455 U.S. 924, 71 L.Ed. 466, 102 S.Ct. 1284 (1982); Luria Steel & Trading Corp. v. Ogden Corp., 484 F.2d 1016, 1023 (3rd Cir. 1973), cert. denied, 414 U.S. 1158, 39 L.Ed.2d 110, 94 S.Ct. 917 (1974).

This rule is even more applicable to the instant case because the court below did not merely indicate by implication that the Assignment was inappropriate. It explicitly stated that the Assignment "is disapproved." The district court was equally explicit in stating that the Agreement of Sale from the Receiver to Linde continued to be valid, but reopened the bidding process. Accordingly, under the rule applied in Morley and the other cases cited above, if Carrier wished to preserve its rights under the Assignment it necessarily was required to appeal. This it did not do, and, this Court may not now direct the trial court to revitalize the Assignment which Carrier effectively abandoned when it elected not to

appeal. Linde, on the other hand, preserved his right to enforce the results of the first judicial sale, at which he was the high bidder.

Moreover, from a purely equitable point of view it would be inappropriate here to direct the district court to confirm the sale to Carrier. Instead of appealing along with Linde and otherwise taking action consistent with the position that the Assignment was valid and remained in force, Carrier demanded the return of the $200,000 it had paid in escrow for the defunct Assignment. Linde agreed to the return of the money because he believed the Assignment to be a nullity, as evidenced by his assignment to Lackawanna Land & Energy, Inc.

Clearly, Carrier has attempted to "play both ends against the middle." Even were it not for the binding judicial precedent of Morley, it would be simply unjust for the Third Circuit to direct the district court to reward Carrier for this chicanery. In any event, as Morley clearly teaches that this Court lacks the power to do what Carrier requests, this Court must deny Carrier's Petition for rehearing.

CONCLUSION

The Third Circuit's instructions to the District Court require no clarification and were correct as issued. Accordingly, for the reasons stated above, Carrier's Petition for Panel Rehearing should be denied.

Respectfully submitted,

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Attorneys for Party to Sale
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Dated: November , 1989

CERTIFICATE OF SERVICE

I, THOMAS I. VANASKIE, ESQ., hereby certify that I have caused to be served a true and correct copy of the foregoing Answer and Memorandum in Opposition to Petition for Panel Rehearing on counsel of record by U.S. first-class mail, addressed as follows:

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DATED: November , 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5157 and 89-5198

UNITED STATES OF AMERICA
V.
TABOR COURT REALTY, ET AL

APPEAL OF SCOTT F. LINDE,
PARTY TO AGREEMENT OF SALE,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 80-1424)

Before: HIGGINBOTHAM, BECKER and NYGAARD,
Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By The Court,

Circuit Judge

Dated: December 21, 1989

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA vs. GLENEAGLES INVESTMENT COMPANY, INC., et at., and SCOTT F. LINDE Party to Agreement of Sale	Civil No. 80-1424 Complaint Filed 12/12/80 (Judge Muir)

FILED
Williamsport, Pa
MAY 23 1990
DONALD B. BERRY, Clerk
PER
DEPUTY CLERK

ORDER
May 23, 1990

1. The sale to Linde under the terms of the Agreement of Sale executed on May 20, 1988 is confirmed.

2. The Receiver shall prepare an appropriate deed or deeds to convey the premises in question.

MUIR, U.S. District Judge

MM:as

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA vs. GLENEAGLES INVESTMENT COMPANY, INC., et at., and SCOTT F. LINDE Party to Agreement of Sale	Civil No. 80-1424 Complaint Filed 12/12/80 (Judge Muir)

FILED
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PER
DEPUTY CLERK

OPINION

MUIR, District Judge

I. Introduction.

On January 4, 1990, Thomas H. Kiley, Receiver for Raymond Colliery Co., Inc., filed a motion to conduct a hearing to determine lf there was collusion in the sale of property which took place on September 2, 1988. A hearing on whether the sale should be confirmed was held on January 18, 1989 and by order of January 24, 1989, we disapproved of the assignment between Linde and Carrier without determining the issue of collusion. Our decision was appealed to the United States Court of Appeals for the Third Circuit and that Court remanded the matter with direction that we "either enter an order confirming the sale from the Receiver to [Linde] or alternatively to conduct further hearing to determine if there was any collusion in the conduct of the sale. A hearing on the issue of collusion was conducted on April 19, 1990

and April 24, 1990. The following are the Court's Findings Of Fact, Discussion, and Conclusions of Law.

II. Findings of Fact..

1. By Order dated March 26, 1985, this court (a) in Paragraph 8 at page 5 ordered the foreclosure of the properties of Raymond Colliery Co., Inc. and its subsidiaries ("Raymond Group") by an Officer of the Court pursuant to 28 U.S.C. §§2001, 2002, and 2004 and 26 U.S.C. §7403(d) to satisfy the liens of the creditors of the Raymond Group; and (b) in Paragraph 11 at page 6 retained jurisdiction over all other matters pertaining to the disposition of the lands of the Raymond Group free and clear of liens. (U)

2. By Order dated April 30, 1986, this Court, among other things, appointed Thomas H. Kiley as the Receiver of the properties of the Raymond Group with authorization to seek purchasers for said properties but without power to sell those properties except upon application made to this Court. (U)

3. Scott F. Linde first had dealings with the Receiver in the spring of 1987, when Linde entered into a lease with the Receiver for land adjacent to the Archbald plant.

4. In November of 1987, Linde was the high bidder for the sum of $365,000 on a parcel of the Raymond Group properties located in Wayne County, described in the Raymond Group Prospectus as the Stillwater/Clinton Colliery area. (U)

5. The Raymond Group Prospectus indicated that Stillwater/Clinton Colliery area contained 858.8 acres. (U)

6. In approximately February or March of 1988, the Receiver informed Linde that the Stillwater/Clinton Colliery area had less acreage than set forth in the Raymond Group Prospectus. (U)

7. During the course of ensuing negotiations concerning the discrepancy in acreage, the Receiver and Linde agreed to include in the sale to Linde an additional 50 acres, known as the "Clinton Culm Bank," which was contiguous to the Stillwater/Clinton parcel, if Linde agreed to pay the additional appraised value on this parcel, $45,000, increasing the total purchase price from $365,000 to $410,000. (U)

8. Both parties consented to this agreement, and the parties eventually closed on the sale of the Stillwater/ Clinton Colliery area, including the 50 acre parcel known as the Clinton Culm Bank. (U)

9 . The Clinton Culm Bank was land on which Carrier Coal Enterprises ("Carrier") had an existing leasehold interest so that Linde was actually acquiring a reversionary interest to the parcel known as the Clinton Culm Bank. (U)

10. The Clinton Culm Bank was one of 8 parcels that the Receiver had been attempting to sell to Carrier, the other 7 parcels being:

A. Powderly Bank, located in the Township Carbondale, Lackawanna County, and approximately 61.93 acres contiguous to the Powderly Bank;

B. Jermyn Bank Area, located in the Borough of Jermyn, Lackawanna County, and approximately 46.30 acres contiguous to the Jermyn bank;

C. Northwest Bank, also known as Gravity Slope Bank, located in the Borough of Archbald, Lackawanna County, and approximately 3.50 acres contiguous to said Northwest Bank;

D. Eddy Creek, located partially in the Borough of Throop and partially in the Borough of Olyphant, Lackawanna County, and approximately 85 acres contiguous to said Eddy Creek;

E. Grassy Island located, in the Borough of Olyphant, Lackawanna County, and approximately 16.30 acres contiguous to said Grassy Island;

F. Marvine Bank No. 6 located in the City of Scranton, Lackawanna County, and approximately 5.30 acres contiguous to said Marvine Bank No. 6; and

G. Moffat Bank Area, located in the Borough of Taylor, Lackawanna County, and approximately 29.10 acres contiguous to said Moffat Bank.

11. On May 19, 1988, the Receiver called Linde and informed him that the Receiver had just had a meeting with a representative of Carrier and that he was going to lose the deal he was putting together with Carrier if the Clinton Culm Bank were conveyed to Linde.

12. After conferring with his brother Eric, Linde refused to release the Clinton Culm Bank from the agreement he had reached with the Receiver but did indicate to the Receiver that he would be interested in acquiring the remaining 7 parcels that had been the subject of a proposed agreement of sale between the Receiver and Carrier.

13. Late in the afternoon of May 19, 1988, Linde met with the Receiver in the Receiver's office to discuss the purchase by Linde of the seven (7) parcels of land identified in paragraph 10, supra, for a purchase price of One Million Four Hundred Eighty-three Thousand and 00/100 ($1,483,000.00) Dollars. (U)

14. At the May 19 meeting, Linde was aware that the Receiver and Carrier had been negotiating the sale by the Receiver to Carrier of the seven (7) parcels of land plus the parcel known as the Clinton Culm Bank.

15. During the course of the May 19 meeting, the Receiver informed Linde that any agreement he entered into for the sale of lands was subject to court approval.

16. During the May 19, 1988 meeting, Linde obtained from the Receiver a copy of the agreement of sale for the 7 parcels of property that had been proposed to be sold to Carrier. (U)

17. The proposed agreement between the Receiver and Carrier had a provision which prohibited assignment of the agreement without the Receiver's written approval.

18. On May 19, 1988, Linde informed the Receiver that it would be necessary for Linde to attract other investors in order to enter into the agreement of sale. (U)

19. The Receiver recommended that Linde use Attorney Allan Kluger as Linde's attorney since Linde's firm was represented by Rosenn, Jenkins & Greenwald, which also represented Carrier. (U)

20. Later on May 19, 1988, Linde conferred with his brother, Eric Linde, and met with John Delvecchio and several of the Kaminski brothers for the purpose of determining whether they would be interested in becoming co-investors with Linde in entering into the agreement of sale. (U)

21. Eric Linde, the Kaminskis, and Delvecchio agreed to become co-investors and provide part of the required earnest money only on the condition that the entire agreement of sale be assignable to Carrier.

22. On May 20, 1988, Linde, Accompanied by Terrence Herron of the law firm of Hourigan, Kluger, Spohrer, & Quinn, met with the Receiver in the Receiver's office. (U)

23. At the meeting, Linde again informed the Receiver that he needed co-investors to be able to sign an agreement of sale and complete the contemplated purchase.

24. At the meeting, Linde, through counsel, asked the Receiver to modify the proposed agreement of sale so that applicable realty transfer taxes would be divided equally between the seller and the buyer.

25. At the meeting, Linde, through counsel, requested that the paragraph in the original draft of the agreement of sale prohibiting assignment without the Receiver's written consent be deleted and the buyer be designated as Scott F. Linde or his assigns. (U)

26. The Receiver agreed to each of these changes without consulting his counsel.

27. These changes were made in the Receiver's office by the Receiver's Administrative Assistant. (U)

28. The Receiver did not request any limitation, restriction, qualification or condition with respect to Linde's right to assign the agreement of sale. (U)

29. On May 20, 1988, the Receiver entered into an agreement of sale with "Scott F. Linde, or his assigns" for the above 7 parcels of property, along with the coal thereunder, for the sum of $1,483,000.

30. Linde did not have any discussions with any representative of Carrier concerning the subject matter of the agreement of sale prior to entering into the agreement of sale with the Receiver. (U)

31. The Receiver did not inform Carrier that Linde had expressed an interest in purchasing the 7 parcels to which the agreement of sale applied and which had been the subject of negotiations between the Receiver and Carrier. (U)

32. During the course of the months of June and July, 1988, Linde attempted to put together a group of investors to purchase all the assets of the Raymond Group, including the lands that were the subject of the agreement of sale. (U)

33. Several weeks after signing the agreement of sale, Linde met with George Myrtetus of Carrier for the purpose of determining whether Carrier would be interested in becoming part of a group to purchase all the assets of the Raymond Group. (U)

34. Carrier was not interested in becoming a part of the group that Linde was attempting to put together. (U)

35. In mid-July, 1988, Linde, on behalf of a group of investors, submitted to the Receiver an offer of $9,100,000.00 for all the assets of the Raymond Group, including the properties that were the subject of the agreement of sale. (U)

36. The Receiver rejected this proposal. (U)

37. On August 8, 1988, the Receiver presented to this Court a motion to approve the agreement of sale to Linde. (U)

38. Prior to presenting the motion for authority to sell the land and coal to which the agreement of sale applies, the Receiver's counsel contacted counsel for the Raymond Group creditors to obtain their concurrence in the motion. (U)

39. No counsel for any of the Raymond Group creditors objected to the motion for approval of the agreement of sale.

40. By Order dated August 8, 1988, this Court approved the agreement of sale to Scott F. Linde upon the terms and subject to the conditions set forth in the Order, including provisions that the sale was subject to publication requirements, to the acceptance of higher bids, and to final confirmation by this court. (U)

41. Pursuant to the August 8, 1988, Order, the Receiver advertised the proposed sale to Linde once a week for 3 consecutive weeks in the Scranton Times, a newspaper of general circulation in Lackawanna County. The advertisement also set forth the terms and conditions for bidding, including the term "PUBLIC NOTICE is Further Given that until 10:00 a.m., prevailing Wilkes-Barre time, Friday, September 2, 1988, any person or entity, including the identified purchaser, wishing to do so, may with respect to the proposed Agreement of Sale, present

to the Receiver a written bid to purchase the lands described in the Agreement of Sale so long as such bid is not less than 11% of the purchase price of the Agreement of Sale. If no such bid is offered, the Receiver shall seek final confirmation from the United States District Court for the Middle District of Pennsylvania to conduct the sale in accordance with the Agreement of Sale." (U)

42. The interest of Raymond Colliery Co., Inc. in the land to which the agreement of sale applied is partly a reversionary interest and part. an unencumbered fee interest. The land which is a reversionary interest is subject to term leases and term deeds in favor of Carrier. The lands which are not subject to reversionary interests are lands which are contiguous to the lands subject to the reversionary interests.

43. Some two to three weeks prior to September 2, 1988, Murray Ufberg, Esq., the attorney for Carrier, telephoned Allen Kluger, Esq., the attorney for Linde, to inquire whether Linde would consider assigning the agreement of sale to Carrier and if so, for what consideration. (U)

44. Thereafter, Attorney Ufberg was informed by Attorney Kluger that Linde would consider assigning his interest under the agreement of sale for $200,000 plus a re-conveyance of the tract known as Marvine Bank No. 6. (U)

45. At approximately 9:00 a.m. on September 2, 1988, Attorney Ufberg called Attorney Kluger and there then ensued negotiations concerning the assignment of Linde's interests under the agreement of sale to Carrier. (U)

46. Prior to September 2, 1988, Attorney Ufberg's office had prepared a proposed written Assignment but had not delivered that: proposed document to Attorney Kluger or Linde. (U)

47. On September 2, 1988, at approximately 9:30 a.m. Scott F. Linde, his brother, Eric Linde, Attorney Kluger and Attorney Herron arrived at the Receiver's Office on the 9th floor of the First Eastern Bank Building in Wilkes-Barre. Shortly thereafter representatives of Carrier and its counsel, Murray Ufberg, Esq., arrived at the Receiver's Office. At the Receiver's office, in addition to the Receiver and his administrative assistant, Barbara Warakomski, were his counsel, Thomas P. Brennan, Esq., and Christine McLaughlin, Esq. (U)

48. Following their arrival Linde's counsel engaged in discussions with Carrier's counsel in the corridor outside the Receiver's office. (U)

49, Thomas P. Brennan, Esq., counsel for the Receiver, was the person conducting the bidding. (U)

50. At approximately 9:45 a.m., in the corridor outside the Receiver's office, Attorney Ufberg informed Attorney Kluger that Carrier was willing to meet the demand of Linde of $200,000 plus re-conveyance of the Marvine No. 6 tract in exchange for as assignment of Linde ' s interests under the agreement of sale. (U)

51. Attorney Ufberg then delivered to Attorney Kluger a proposed written Assignment. (U)

52. Attorney Kluger requested that his associate, Attorney Herron, draft language to effectuate the parties' agreement that, in addition to payment of $200,000, Carrier would re-convey the Marvine No. 6 tract to Linde. (U)

53. At approximately 9:45 a.m., Attorney Ufberg and Attorney Kluger informed the Receiver and his counsel that Linde would be assigning his rights under the agreement of sale to Carrier, as per a written assignment agreement dated September 2, 1988. (U)

54. Mr. Ufberg and Mr. Kluger met with Mr. Brennan to advise him and the Receiver that Linde would be assigning his rights under the agreement of sale to Carrier and that Carrier would not be submitting a bid to the Receiver. (U)

55. Counsel for Linde and counsel for Carrier further advised the Receiver that because the purchaser or purchasers in the agreement of sale were designated as Scott F. Linde or his assigns and because the agreement of sale did not preclude an assignment, the action by Linde and Carrier was lawful and binding on the Receiver. (U)

56. Counsel for the Receiver responded that an assignment to a competitive purchaser was improper.

57. Counsel for Carrier and counsel for Linde then returned to the corridor outside the Receiver's office where the assignment was finalized. (U)

58. Shortly thereafter, counsel for Linde and counsel for Carrier advised the Receiver that the assignment had been EXECUTED and that there would be no bidding by either of them.

59. All negotiations pertaining to the assignment of Linde's interests under the agreement of sale to Carrier

were conducted through counsel for Carrier and counsel for Linde.

60. On Friday morning, September 9, 1988, Linde delivered to the Receiver a copy of the Assignment dated September 2, 1988. (U)

61. On September 13, 1988, the Receiver, believing that Linde had breached the agreement of sale by his assignment of his interest to Carrier, drew One Hundred Forty-eight Thousand Three Hundred and 00/100 ($148,300.00) Dollars under the letter of credit which Linde had provided as security for faithful performance under the agreement of sale and such amount is being held by the Receiver pending these proceedings.

III. Discussion.

The issue which we are to determine is whether there was collusion between Linde and Carrier in the conduct of the sale of 7 parcels of land which are a portion of the properties of Raymond Colliery Co., Inc. In its opinion which reviewed our order of January 24, 1989, setting aside the assignment of the agreement of sale to Carrier, the Court of Appeals concluded that "there are neither facts nor findings which would indicate any fraud or collusion, in the conduct of sale, or that the sale was so grossly inadequate as to shock the conscience of the Court." The United States vs. Tabor Court Realty, et al., No. 89-5157 and 89-5198, slip op. at 11 (3rd Cir. July 10, 1989). The Receiver has attempted to show that Linde fraudulently induced the Receiver to alter the agreement

of sale and that Carrier later joined in this fraud by negotiating and ultimately purchasing the assignment from Linde.

Collusion is defined as:

> An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain object forbidden by law....A secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose.

Black's Law Dictionary (5th ed. 1979 at p. 240); See also Corabi vs. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959). In attempting to establish collusion between Linde and Carrier the Receiver alleges that the Receiver was fraudulently induced into changing the language of the agreement of sale so that the agreement might be assignable without restriction. The Receiver has introduced evidence which indicates that Linde may have had the intent to assign the agreement of sale to Carrier prior to his meeting with the Receiver on May 20, 1988 but failed to indicate to the Receiver that Carrier was the intended assignee. It is alleged that Linde's failure to inform the Receiver of this fact was intentional because of Linde's knowledge that Carrier was a competing bidder for the property and the Receiver would in all likelihood not have changed the assignment clause had he known that Linde intended to assign the agreement of sale to Carrier.
We recognize, as did the Court of Appeals, that parol evidence is admissible to establish fraud in the inducement and we permitted the introduction of such evidence during the hearing. See, United States vs Tabor Court

Realty, et al., slip op. at p. 8, fn. 1. The issue of whether there was fraud in the inducement, however, is only relevent insofar as it may establish collusion between Linde and Carrier in the conduct of the sale. As the receiver points out in his Trial Brief "Linde's fraud in the negotiations does not establish collusion." (Receiver's Trial Brief, p. 6). A conclusion that Linde fraudulently induced the Receiver to alter the agreement of sale in itself is not sufficient to set aside the sale absent evidence that Carrier either participated in or had knowledge of the alleged fraud.

We will first consider whether Carrier can be said to have taken part in the alleged misrepresentation made by Linde to the Receiver. There is no evidence to indicate that Carrier was a participant in the negotiations between Linde and the Receiver which resulted in the assignment language in the agreement of sale being changed. The facts indicate that the Receiver, although negotiating with Carrier for the 7 parcels of land, did not inform Carrier that Linde had expressed an interest in purchasing those same parcels. Linde was aware that the Receiver had been negotiating with Carrier for the parcels of land which were the subject of the agreement of sale; however, the evidence shows that he did not disclose to any representative of Carrier the subject matter of the agreement of sale prior to his entering into that agreement with the Receiver.

We will next consider whether Carrier became aware of Linde's representations to the Receiver at any time after the agreement of sale was signed and Carrier began negotiating with Linde for the properties. There is no evidence that Carrier had knowledge of any of the allegedly fraudulent representations or omissions made by Linde to induce the Receiver to alter the agreement of sale so as to make it assignable without limitation. Carrier and Linde were represented by different counsel at all times during negotiations for the properties in question. Several weeks after the signing of the agreement of sale there was an attempt by Linde to include Carrier in a group of investors to purchase all of the assets of the Raymond Group including those properties which were the subject of the agreement of sale. Carrier indicated that it was not interested in becoming a part of such an investment group prior to the Receiver's rejection of this proposal. It was only two to three weeks prior to the September 2, 1988, sale that negotiations began between Carrier's and Linde's attorneys for an assignment of the agreement of sale. There is no indication that during the time in which the parties were negotiating the possibility of an assignment Carrier had any knowledge that such an assignment would be improper. The agreement of sale clearly stated that it was assignable and there was no restriction with regard to whom it may be assigned. The only fact which was presented to indicate that Carrier was put on notice that such an assignment would

be improper was immediately before the assignment was executed on September 2, 1988. At that time counsel for the Receiver informed Linde and Carrier that such an assignment to a competitive bidder was improper.

It is probable that Carrier knew that the Receiver expected and would have preferred that Carrier bid against Linde for the property; however, we may not infer collusive conduct from this knowledge. The Court of Appeals held that "[t]he alleged frustration of the bid process is insufficient reason to invalidate the assignment absent a finding of fraud or collusion." United States vs. Tabor Court Realty, et al., slip op. at 9. Based upon the facts presented we fail to see how the possibility of fraud in the inducement on the part of Linde implicates Carrier's purchase of the assignment and the Court of Appeals decision in this case precludes a finding that the assignment to Carrier in itself would indicate collusive conduct. We, therefore, conclude that there was no collusion in the conduct of the sale of September 2, 1988.

IV. Conclusions of Law.

1. Carrier did not participate in any fraudulent scheme to secure amendment of the agreement of sale between Linde and the Receiver so as to be assignable without limitation.

2. Carrier was not put on notice that an assignment to Carrier was unlawful.

3. There was no collusion between Linde and Carrier in the conduct of the sale which took place on September 2, 1988.

An appropriate order will be entered.

MUIR, U.S. District Judge

MM : as

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,		
vs.	:	Civil No. 80-1424
GLENEAGLES INVESTMENT, COMPANY, INC., et al.,	:	Complaint Filed 12/12/80
	:	(Judge Muir)

MOTION FOR ENTRY OF ORDER DIRECTING RECEIVER TO CONVEY REAL ESTATE INTERESTS

COMES NOW, CARRIER COAL ENTERPRISES, a Pennsylvania Limited Partnership ("Carrier"), and avers as follows:

1. By Order dated March 26, 1985, this Court:(a) in Paragraph 8 at page 5, ordered the forclosure of the properties of Raymond Colliery Co., Inc. and its subsidiaries ("Raymond Group") by an officer of the Court pursuant to 28 U.S.C. §§2001, 2002, and 2004 and 26 U.S.C. §7403(d) to satisfy liens of the creditors of the Raymond Group; and (b) in Paragraph 11 at page 6, retained jurisdiction over all other matters pertaining to the disposition of the lands of the Raymond Group free and clear of liens.

2. By Order dated April 30, 1986, this Court, among other things, appointed Thomas H. Kiley as the Receiver ("Receiver") of the properties of the Raymond Group with authorization to seek purchasers for said properties but without power to sell those properties except upon application made to this Court.

3. On November 20, 1988, the Receiver and one Scott F. Linde ("Linde") entered into a certain agreement ("Agreement of Sale") for the sale of certain of the Raymond Group's real estate interests to "Scott F. Linde, or his assigns."

4. On September 2, 1988, Linde assigned his rights under the Agreement of Sale to Carrier. A copy of the assignment agreement ("Assignment") between Linde and Carrier is attached as Exhibit "A".

5. On January 24, 1989, this Court entered an order disapproving of the Assignment, and an appeal was thereafter taken by Linde to the United States Court of Appeals for the Third Circuit ("Third Circuit"), which then remanded the matter back to this Court with instructions to "either enter an order confirming the sale from the Receiver to Appellant or alternatively to conduct further hearing to determine if there was any collusion in the conduct of the sale."

6. A hearing on the issue of collusion was conducted before this Court on April 19, 1990 and April 24, 1990; and on May 23, 1998, this Court entered an order: a) confirming the sale to Linde under the terms of the Agreement of Sale, and b) directing the Receiver to ". . . prepare an appropriate deed or deeds to convey the premises in question."

7. In a letter dated May 30, 1990, Carrier's counsel requested the Receiver to convey the premises in question to Carrier, as Linde's lawful assignee. A copy of Carrier's letter is attached as Exhibit "B".

8. In a letter dated May 31, 1990, Linde's counsel requested the Receiver to convey the premises in question to Lackawanna Land and Energy, Inc. ("Lackawanna"), an entity to which Linde's rights had purportedly been assigned through an assignment dated April 28, 1989. Copies of Linde's letter and the purported assignment to Lackawanna are attached as Exhibits C and D, respectively.

9. In a letter dated June 1, 1990, the Receiver's counsel informed Carrier that the Receiver was unwilling to convey the Premises in question to Carrier. A copy of the Receiver's letter is attached as Exhibit "E".

10. The Assignment between Carrier and Linde is a valid, binding, and enforceable contract.

11. The Receiver is legally obligated to deed the premises in question to Carrier, as Linde's lawful assignee.

WHEREFORE, Carrier prays that the Court direct specific performance of the Assignment between Carrier and Linde, and that the Court further direct the Receiver to convey the Premises in question to Carrier, as Linde's assignee, and that the Court grant such other relief as is just.

ROSENN, JENKINS & GREENWALD

By: Robert Spielman

ROBERT SPIELMAN, ESQUIRE

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FILED
Williamsport Pa
OCT 22 1990
DONALD R. BERRY, Clerk
PER
DEPUTY CLERK

UNITED STATES OF AMERICA,
Plaintiff • CIVIL NO. 80-1424

vs. : Reassigned to Judge Muir
: 3/5/81

GLENEAGLES INVESTMENT COMPANY, INC., et al.
and • (Complaint filed 12/12/80)
SCOTT F. LINDE,

Party to Agreement of Sale

ANSWER TO MOTION FOR ENTRY OF ORDER DIRECTING RECEIVER TO CONVEY REAL ESTATE INTERESTS

NOW COMES SCOTT F. LINDE ("Linde"), by and through his attorneys, Dilworth, Paxson, Kalish & Kauffman, and makes the following Answer to the Motion for Entry of Order Directing Receiver to Convey Real Estate Interests filed by Carrier Coal Enterprise ("Carrier"), and responds to the individual paragraphs of that Motion as follows:

1. Admitted.

2. Admitted.

3. Admitted, except the Agreement of Sale was executed on May 20, 1988, not November 20, 1988 as alleged.

4. Admitted. By way of further response, the Assignment of Agreement of Sale from Linde to Carrier explicitly

recognized that ". . . the obligation of the Receiver to complete settlement under the Agreement is, inter alia, subject to prior approval of the United States District Court for the Middle District of Pennsylvania . . . ." The Assignment of Agreement of Sale also stated: "In the event that further approval of court approving the sale to Assignee is not obtained, then in that event, all monies paid pursuant to this Agreement shall be returned to Assignee and the parties released from further liability under this Agreement."

5. Admitted. By way of further response, Carrier, although certainly an aggrieved party under the terms of this Court's Order of January 24, 1989, did not appeal. Rather, Carrier committed two acts which served to indicate that Carrier itself believed that its rights under the Assignment of Agreement of Sale no longer existed. First, Carrier requested the return of the $200,000 which had been placed in escrow under the control of Allen M. Kluger, Esquire. Second, Carrier bid at the second public sale which was conducted during the pendency of Linde's appeal to the United States Court of Appeals for the Third Circuit. These acts corroborated Linde's belief that the District Court's disapproval of the Assignment rendered it a legal nullity under its own terms.

6. Admitted, except that the Court's Order is dated May 23, 1990, not May 23, 1998. By way of further response,

while the Court's Order of May 23, 1990 explicitly confirmed ". . . sale to Linde under the terms of the Agreement of Sale executed on May 20, 1988", the Order confers no rights on Carrier.

7. While Carrier's counsel did not afford Linde the courtesy of a copy of Carrier's letter to the Receiver, it is admitted that the letter was sent and did request that the Receiver convey the premises in question to Carrier.

8. Admitted. By way of further response, Linde's April 28, 1989 Assignment to Lackawanna Land and Energy, Inc. was entirely consistent with his belief that, due to Carrier's failure to appeal and due to the literal language of the Assignment to Carrier which released the parties from liability in the event the District Court disapproved, as it did, the Sale to Carrier, the Assignment from Linde to Carrier became void on the date when Carrier's time to appeal the District Court's Order of January 24, 1989 expired.

9. Admitted.

10-11. Denied.

WHEREFORE, Linde prays that this Court deny Carrier's Motion and that the Court clarify its Order of May 23, 1990 to

specifically direct that the Receiver convey the premises in question to Lackawanna Land and Energy, Inc.

Respectfully submitted,

DILWORTH, PAXSON, KALISH & KAUFFMAN

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Thomas D. Brown, Esq.

600 Penn Security Bank Building
Scranton, PA 18503
(717) 346-7569

Attorneys for Party of Agreement
Scott F. Linde

Dated: June 22, 1990

CERTIFICATE OF SERVICE

I, THOMAS I. VANASKIE, ESQ., hereby certify that I have caused to be served a true and correct copy of the foregoing Answer to Motion for Entry of Order Directing Receiver to Convey Real Estate Interests on counsel of record by U.S. first-class mail, addressed as follows:

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Thomas I. Vanaskie, Esq.

DATED: June 22, 1990

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, vs. GLENEAGLES INVESTMENT COMPANY, INC., et al., and SCOTT F. LINDE, Party to Agreement of Sale	Civil No. 80-1424 Complaint Filed 12/12/80 (Judge Muir)

13 cc P
& A/H
8/15/90

FILED
Williamsport, Pa.
AUG 15 1990
DONALD R. BERRY, Clerk
PER
DEPUTY CLERK

ORDER
August 15, 1990

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

By order and opinion on May 23, 1990, we confirmed the sale to Scott F. Linde (Linde) under the terms of the Agreement of Sale executed on May 20, 1988 of certain property known as "the Clinton Culm Bank" following a hearing held on April 19 and April 24, 1990, dealing with the issue of alleged collusion in the conduct of the sale. Our order directed the Receiver to prepare an appropriate deed or deeds to convey the premises in question to Linde. On June 8, 1990, 16 days later, Carrier Coal Enterprises (Carrier), the assignee under an Assignment Agreement between Linde and Carrier, filed a motion for entry of an order directing the Receiver to convey real estate interests in the same property to Carrier. In effect, Carrier requests that we direct specific performance of the assignment agreement between Linde and Carrier.

A brief in support of its motion was filed on the same date and on June 22, 1990, Linde filed a brief in opposition and an answer to the motion of Carrier. On July 2, 1990, Carrier filed a reply brief. On July 5, 1990, Carrier filed a motion for a hearing on its motion. On July 12, 1990, Linde filed an answer in opposition to Carrier's motion for a hearing. On July 13, 1990, Carrier filed a brief in support of its motion for a hearing. On August 2, 1990, Linde filed a brief in opposition to the motion for a hearing and on August 9, 1990, Carrier filed a reply brief.

In its motion requesting specific performance of the assignment of the Agreement of Sale between Linde and Carrier, Carrier asserts that the assignment is a valid, binding, and enforceable contract and that the Receiver is legally obligated to convey the premises in question to Carrier as Linde's lawful assignee. Linde argues that the literal terms of the assignment of the Agreement of Sale provide that if district court approval was not obtained for the assignment, it would be extinguished and because we specifically disapproved of the assignment in our order of January 24, 1989 the assignment is no longer valid. Linde also argues that Carrier's failure to appeal our order of January 24, 1989, precludes it from requesting relief of this Court not specifically authorized by the remand order of the United States Court of Appeals for the Third Circuit.

Paragraph 4 of the Assignment of Agreement of Sale states:

> 4. Assignee's obligation to effectuate payment of the agreed upon consideration under this Agreement is based upon Assignee obtaining approval of the court for the United States District Court of the Middle District of Pennsylvania to the execution of the deed conveying title to Assignee. In the event that further approval of court approving the sale to Assignee is not obtained, then in that event, all monies paid pursuant to this Agreement shall be returned to Assignee and the parties released from further liability under this Agreement.

Our January 24, 1989, order disapproved of the Assignment but validated the Agreement of Sale between Linde and the Receiver subject to the results of a second judicial sale. Linde appealed our decision of January 24, 1989. Carrier did not file an appeal from our decision of that date but did bid at the second judicial sale. The relief requested by Linde of the Appellate Court was to "direct the specific enforcement of the Agreement of Sale between Linde and the Receiver." (Linde's appellate brief, p. 37). There was no request by Linde that the assignment between Linde and Carrier be approved. The relief granted by the Court or Appeals was a remand to this Court with instructions either to enter an order confirming the sale from the Receiver to Linde or to conduct a further hearing as to the issue of collusion in the conduct of the sale. Accordingly, we held hearing at the request of the Receiver and determined that there was no collusion in the conduct or the sale. By order and opinion of May 23, 1990, we confirmed the sale to Linde under the terms of the Agreement of Sale executed on May 20, 1988.

Both Linde and Carrier agree that the issue of the validity or enforceability of the assignment was not raised by Linde in his appeal.

Following the decision of the Court of Appeals, Carrier petitioned that court for a rehearing requesting that we be instructed to confirm the sale from the Receiver to Carrier as Linde's assignee. The Court of Appeals denied the request to modify its instruction. United States of America vs. Tabor Court Realty, et al., Nos. 89-5157 and 89-5198, (3d Cir. December 21, 1989). Carrier's rights under the assignment may have been extinguished by our disapproval of the assignment. Carrier may well have been obliged to appeal from our order if it sought relief from our determination. See Morley Constructlon Co. vs. Maryland Casualty Co., 300 U.S. 185 (1937).

It is our view that Carrier's motion for us to direct the Receiver to convey directly to Carrier is not a proper vehicle for a determination of Carrier's rights if any, against Linde. The Receiver's function under the mandate of the Court of Appeals was and is to convey to Linde and he has no interest in the dispute between those parties. This order does not constitute an adjudication on the merits of the dispute between Linde and Carrier.

In view or the above discussion we see no need for an evidentiary hearing and shall deny Carrier's motion for a hearing on these issues.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Carrier's motion filed on June 8, 1990, for entry of order directing the Receiver to convey real estate interests is denied.

2. Carrier's motion filed on July 5, 1990, for hearing on its motion for entry of order directing the Receiver to convey real estate interests is denied.

3. This order is without prejudice to Carrier's right to file an appropriate action against Linde in the proper court if it decides to do so.

MUIR, U.S. District Judge

MM:as

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-5802

UNITED STATES OF AMERICA

VS.

TABOR COURT REALTY, IT AL.

APPEAL OF CARRIER COAL ENTERPRISES,
PARTY TO ASSIGNMENT OF AGREEMENT OF SALE

Appellant

Appeal From The Order Entered On august 15, 1990
By The United States District Court For The Middle
District Of Pennsylvania In Civil Action Nio. 80-1424

RESPONSE OF APPELLEE SCOTT F. LINDE TO REQUEST FOR SUPPLEMENTAL INFORMATION

DILWORTH, PAXSON, KALISH & KAUFFMAN

Thomas I. Vanaskie
Thomas D. Brown

600 Penn Security Bank Building
Scranton, Pa.
(717) 346-7569

HOURIGAN, KLUGER, SPOHRER & QUINN, P.C.

Geroge A. Spohrer

Suite 700
United Penn Bank Building
Wilkes-Barre, Pa 18701
(717) 825-9401

Attorneys for Appellee
Scott F. Linde

SCOTT F. LINDE'S RESPONSE TO COURT REQUEST FOR SUPPLEMENTAL INFORMATION

Scott F. Linde ("Linde"), appellee in the above referenced matter, hereby submits the following as his response to the letter of February 25, 1991, requesting supplemental information:

1. With respect to the request for correspondence related to the deposit and return of the escrow funds, the following is provided:

(a) Letter of September 2, 1988 from Murray Ufberg, Esq. to Allan M. Kluger, Esq., attached to which is a photocopy of a check drawn on the Distribution Account of Carrier Coal Enterprises, dated September 2, 1988, in the amount of $200,000, payable to Attorneys Kluger and Ufberg, as Escrow Agents. (Exhibit "A" hereto.)

(b) May 30, 1989 letter of Attorney Ufberg to Attorney Kluger along with a photocopy of a withdrawal slip for the withdrawal of $200,000 from United Penn Bank. (Exhibit "B" hereto) Please note that May 30, 1989 was the first business day following the second judicial sale in this matter, which was conducted on Friday, May 26, 1989. It is believed that the May 30, 1989 letter of Attorney Ufberg is the only correspondence received by Attorney Kluger in connection with the withdrawal of the $200,000 escrowed funds. It is also believed that there was no correspondence from Attorney Kluger to Attorney Ufberg at the time the funds were withdrawn and returned.

(c) A photocopy of a withdrawal slip dated May 31, 1989 for the withdrawal of $206,805.67 from the escrow account, representing the $200,000 escrow deposit plus accrued interest. (Exhibit "C" hereto.) The withdrawal slip is signed by both Attorneys Kluger and Ufberg.

(d) While there is no other correspondence that relates directly to the deposit and return of the escrow funds, there is other correspondence and documentation

that places the return of the escrowed funds in proper perspective. The other correspondence and documents are:

(i) Attorney Kluger's letter of March 15, 1989 to Attorney Ufberg in which Attorney Kluger expresses his view that the escrowed funds should be returned to Carrier Coal Enterprises. (Exhibit "E" hereto.)

(ii) Attorney Robert Spielman's letter of March 29, 1989 to Attorney Kluger responding to Attorney Kluger's March 15, 1989 letter, in which Mr. Spielman indicated that, at that time, it was Carrier's preference to permit the payment to remain in escrow until the issues raised by Scott F. Linde had been resolved by the United States Court of Appeals for the Third Circuit. (Exhibit "E")

(iii) Statement of Scott F. Linde, presented at the May 26, 1989 judicial sale, in which Mr. Linde made clear his position that his appeal was intended to protect only his interests in seeking specific performance of the Agreement of Sale of May 20, 1988, not the Assignment of September 2, 1988. (Exhibit "F" hereto.)

(iv) June 14, 1990 correspondence from Scott F. Linde to the undersigned setting forth his recollection of the events surrounding the return of the escrowed funds. (Exhibit "G") hereto.) It is Mr. Linde's recollection that he requested that Carrier provide a written acknowledgment that Linde was being released from further liability under the Agreement, but that if Carrier was unwilling to provide such a release, the escrowed monies should be returned because Linde was of the opinion that obligations under the Assignment had expired with Judge Muir's ruling of January 24, 1989 and Carrier's failure to appeal therefrom.

(v) Attorney Kluger's letter of December 14, 1990 in which he indicates that it was his recollection that he agreed that the return of the escrowed funds would not effect the Assignment. (Exhibit "H" hereto.)

(vi) Linde's letter of January 18, 1991, raising questions pertinent to Attorney Kluger's letter of December 14, 1990. (Exhibit "I" hereto.)

2. The escrowed funds were in fact returned.

3. It is believed that the escrowed funds were returned on May 31, 1989. Attached hereto as Exhibit "C" is a copy of the withdrawal slip for withdrawal of $206, 805.67, which represented the escrowed funds with accrued interest. The Escrowed funds had been maintained in a savings account, and there is no other indication of the manner in which the funds were withdrawn.

4. Mr. Linde has not had the Marvine Colliery tract appraised. He has no reason to dispute that the Receiver's appraisal placed a value on the property of $74,000. It should be noted, however, that it is Linde's understanding that long term leases may encumber a substantial part of this tract and he does not know whether the appraisal of the property took into account the possibility that the tract may be encumbered by long term leases.

Respectfully submitted,

DILWORTH, PAXSON, KALISH &KAUFFMAN

Thomas I. Vanaskie, Esq.
Thomas D. Brown, Esq.

600 Penn Security Bank Bldg.
Scranton, Pa 18503
(717) 346-7569

Attorneys for Defendants
Scott F. Linde and Lackawanna
Land & Energy, Inc.

DATED: February 27, 1991

CERTIFICATE OF SERVICE

I, THOMAS I. VANASKIE, ESQ., hereby certify that I have caused to be served on this day a true and correct copy of the foregoing Response of Appellee Scott F. Linde to Request for Supplemental Information by first-class mail, postage prepaid and addressed as follows:

Thomas P. Brennan, Esq.
Gallagher, Brennan & Gill
300 First Eastern Plaza
60 Public Square
Wilkes-Barre, Pa 18701

John G.Whelley, Esq.
Rosenn, Jenkins & Greenwald
15 S. Franklin Street
Wilkes-Barre, Pa 18711

Thomas I. Vanaskie

Thomas I. Vanaskie, Esq.

Dated: February 27, 1991

LAW OFFICES
ROSENN, JENKINS & GREENWALD
15 SOUTH FRANKLIN STREET
WILKES-BARRE, PENNSYLVANIA 18711
TELEPHONE
717 826 5600
TELECOPIER
717 826 5691

September 2, 1988

Allan M. Kluger, Esq.
Hourigan, Kluger, Spohrer, Quinn & Associates
United Penn Bank Building
Wilkes-Barre, PA 18701

Re: Assignment of Agreement of Sale by Scott F. Linde to Carrier Coal Enterprises

Dear Allan:

In accordance with the understanding reached between our clients today, I am forwarding to you at this time a copy of the executed Assignment of Agreement of Sale, dated September 2, 1988, by and between Scott F. Linde and Carrier Coal Enterprises.

The Assignment of course calls for the payment of $200,000.00 to Scott, to be held in escrow by you and by me and, to that end, I have endorsed the check and would ask that you do the same and see to its immediate deposit in an interest-bearing account, it being understood, pursuant to Paragraph 9 of the Assignment, that all of the interest which shall accrue shall be deemed income to the assignor unless of course the Assignment is nullified by the Court, in which case the escrow principal, together with interest, shall be returned to our client. It is our understanding that you will now formally notify Thomas H. Kiley, Receiver, of the Assignment, which notice shall not attach a copy of the Assignment enclosed herein.

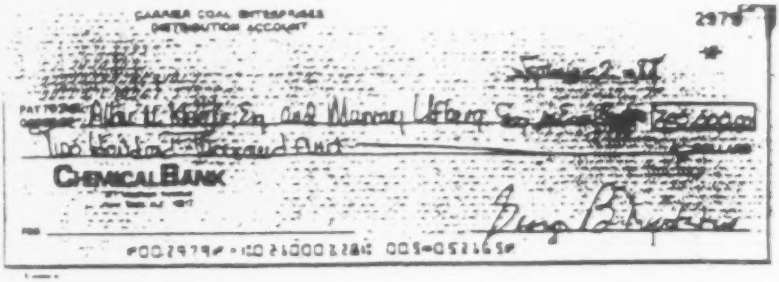
I am most pleased that we have been able to conclude this matter in a fashion satisfactory to all concerned and thank you for your assistance.

Sincerely,

MURRAY UFBERG

MU/rt
enc.
cc: Messrs. George B. Myrtetus
and Michael Steinberg
Mr. Scott F. Linde
Mark A. Van Loon, Esq.

EXHIBIT
"A"
ALL-STATE LEGAL SUPPLY CO.



May 30, 1989

Allan M. Kluger, Esq.
Hourigan, Kluger, Spohrer & Quinn
700 United Penn Bank Building
Wilkes-Barre, PA 18701

HAND DELIVERED

Re: Carrier Coal Enterprises Distribution Account

Dear Allan:

Enclosed is the original withdrawal for $200,000.00 from the account above-captioned. I would appreciate your forwarding the check for $200,000.00 to me today, made payable to Carrier Coal Enterprises, and would furthermore be most appreciative if you would also obtain a check for the interest, made payable to our client, after you have had an opportunity to verify the appropriateness of doing so with the Lindes. Many thanks for your assistance.

With best regards, I am

Sincerely,

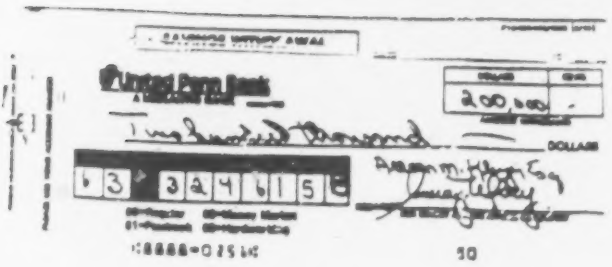
MURRAY UFBERG

MJ/rst
enc.
bcc: Messrs. Michael Steinberg and
George Myrtetus
Mark A. Van Loon, Esq.
William L. Higgs, Esq.

EXHIBIT

" B "

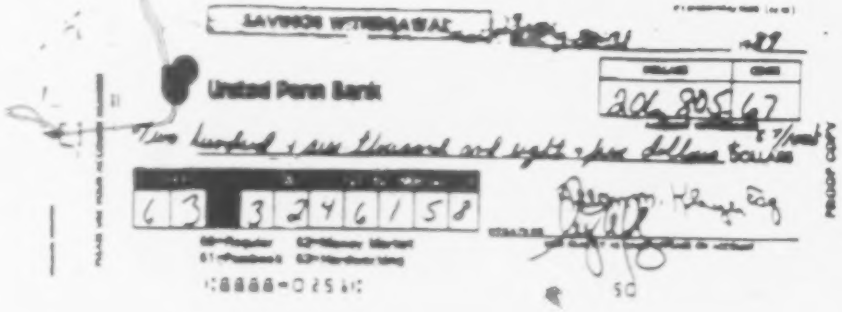
ALL STATE LEGAL SUPPLY CO.



EXHIBIT

" C "

ALL STATE LEGAL SUPPLY CO.



March 15, 1989

Murray Ufberg, Esquire
Rosenn, Jenkins & Greenwald
15 South Franklin Street
Wilkes-Barre, PA 18701

Dear Murray:

As you will recall, we opened a savings account some time ago in your name and my name as escrow agents in connection with an Assignment of the Agreement of Sale between Scott F. Linde and Carrier Coal Enterprises dated September 2, 1988.

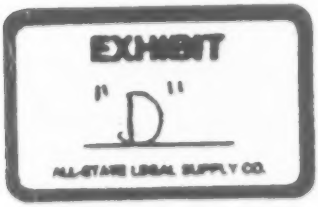
It would appear to me that in view of the decision of Judge Muir, the money should be returned to your client.

I would appreciate your calling me regarding this matter at your earliest convenience.

Sincerely,

Allen M. Kluger

AMK:sh



LAW OFFICES
ROSENN, JENKINS & GREENWALD
15 SOUTH FRANKLIN STREET
WILKES-BARRE, PENNSYLVANIA 18711
TELEPHONE
717-826-5600

March 29, 1989

Allan M. Kluger, Esq.
Hourigan, Kluger, Spohrer & Quinn
Suite 700
United Penn Bank Building
Wilkes-Barre, PA 18701-1867

RE: Raymond Colliery Co., Inc.

Dear Allan:

Murray Ufberg asked me to respond to your letter of March 15, 1989, in which you proposed the return of the escrowed $200,000.00 payment which had been made by Carrier Coal Enterprises ("Carrier") in accordance with the assignment agreement between Carrier and your client, Scott F. Linde. Since Mr. Linde has appealed Judge Muir's decision concerning the legal propriety and enforceability of the assignment agreement, Carrier prefers to permit its payment to remain in escrow until the issues raised by Mr. Linde are resolved by the Third Circuit. If you have any objections to this suggestion, please contact me.

Incidentally, since the escrowed funds are earning interest, it is Carrier's understanding that it will be entitled to the return of the accrued interest as well as the $2000,000.00 principal, should the Third Circuit find the assignment agreement to be unenforceable or otherwise legally invalid. If your understanding differs, please also contact me.

Sincerely,

Robert Spielman

ROBERT SPIELMAN

RS:gr
cc: Mr. George B. Myrtetus
Murray Ufberg, Esq.
Mark A. Van Loon, Esq.

EXHIBIT
"E"

STATEMENT OF SCOTT F. LINDE

To all in attendance at the Public Sale of certain unimproved lands of Raymond Colliery Co., Inc., and its subsidiaries which are subject to an Agreement of Sale dated May 20, 1988 between Thomas H. Kiley, Receiver for Raymond Colliery Co., Inc., and its subsidiaries, on the one hand, and Scott F. Linde or his assigns, on the other:

Scott F. Linde, and his assign under the Agreement of Sale of May 20, 1988, Lackawanna Land and Energy, Inc., object to this public sale on the following grounds:

First, Scott F. Linde claims an entitlement to specific performance of the Agreement of Sale of May 20, 1988, without further bidding. The lands subject to the Agreement of Sale were subject to a public sale conducted by the Receiver on September 2, 1988. Since no party submitted a bid at that public sale, Scott F. Linde claims that the Receiver was obligated to seek final confirmation from the United States District Court for the Middle District of Pennsylvania to complete the sale of the lands in question in accordance with the Agreement of Sale. The question of whether Scott F. Linde is entitled to purchase the lands in question in accordance with the terms of the May 20, 1988 Agreement of Sale is presently before the United States Court of Appeals for the Third Circuit. If Scott F. Linde prevails on that appeal, he and his assign, Lackawanna Land and Energy, Inc., will seek specific performance of that Agreement of Sale. The successful bidder at this public sale is subject tolosing any interests in the properties in question in the event that Scott F. Linde's appeal is successful.

Second, Scott F. Linde and his assign, Lackawanna Land and Energy, Inc., contend that the procedures for this public sale as set forth in the Legal Advertisement published by the Receiver are defective. There is no maximum time for a party to respond to a bid, thus creating the possibility that the bidding may remain open for an unreasonably long time awaiting a bid. In addition, there are no pre-qualification requirements of any bidder, thus creating the possibility for sham bidding.

For these reasons, Scott F. Linde and his assign, Lackawanna Land and Energy, Inc., object to the conduct of this Public Sale. If Scott F. Linde or his assign, Lackawanna Land and Energy, Inc., participate in this Public Sale, each will do so under protest and without waiver of the foregoing objections and any other challenges available to then with respect to this Public Sale.

LACKAWANNA LAND & ENERGY INC.
(08) HIGHWAY 315
SUITE D
PLAINS TOWNSHIP
WILKES-BARRE PA 18702
(717) 824-6611
FAX (717) 825-9902

June 14, 1990

Atty. Tom Vanaskie
Dilworth, Paxson, Kalish & Kauffman
Penn Security Bank Building
Scranton, PA 18505-1862

Re: Response to
June 8, 1990
correspondence

Dear Tom:

Shortly after Carrier Coal chose to bid $1,631,000.00 on May 26, 1989, at the second bid for the Raymond lands, Attorney Kluger contacted me on my car phone. He stated that Carrier had requested the return of the $200,000.00 deposit monies for the assignment dated September 2, 1988.

I told Allen that it was my understanding that the Assignment was no longer valid based on Article 4, page 2.

"4. Assignee's obligation to effectuate payment of the agreed upon consideration under this Agreement is based upon Assignee obtaining approval of the court for the United States District Court of the Middle District of Pennsylvania to the execution of the deed conveying title to Assignee in the event that further approval of court approving the sale to Assignee is not obtained, then in that event, all monies paid pursuant to this Agreement

shall be returned to Assignee and the parties released from further liability under this Agreement."

I then requested that Allen procure a written acknowledgment of the release from further liability under the Agreement if possible, but stated that regardless of his ability to procure such a written statement he could release the escrow monies as far as I was concerned. I did not feel as if Allen was acting as my counsel as much as he was acting as an Escrow Agent under paragraph 7 and 8 on pages 3 and 4 of the Assignment of the Agreement of Sale which reads as follows:

"7. Allan M. Kluger and Murray Ufberg are hereby named as Escrow Agents for all escrow accounts that may be established hereunder. In the event a dispute arises as to the proper distribution of the funds held by the Escrow Agents, any party may petition the Court of Common Pleas of Luzerne County in an appropriate proceeding to determine who shall be entitled to said funds of any part thereof, and the parties agree to abide by the decision of said court and the said Escrow Agents, upon making disbursement of said funds in accordance with the decision of said Court, or upon the mutual agreement of the parties in connection with this Agreement.

8. The Escrow Agents may rely upon and shall be protected in acting or refraining from acting upon any written notice of communication furnished to them pursuant to this Agreement and believed by them to be genuine and have been signed or presented by the proper party or parties and shall not be liable in connection with the performance by them of their duties pursuant to the provisions of this Agreement, except for their own willful default of willful negligence. The Escrow Agents shall not be liable for any action taken by them in good faith and believed by them to be authorized or within the rights

or powers conferred upon them by this Agreement. The parties hereto agree to indemnify and hold the Escrow Agents harmless from and against any loss, liability or expense incurred without willful default or willful negligence on the part of the Escrow Agents arising out of or in connection with this Agreement, including the cost and expense of defending themselves against any claims or liability. All monies paid to the Escrow Agents hereunder shall be placed in any interest-bearing account as the Escrow Agents in their sole discretion may deem desirable.

It is also arguable that the Assignment was further rendered null and void by Carrier's action May 26, 1989 with the bid of 110% of the original Sales Agreement price as set forth in Paragraph 5, page 3 of the Potential Assignment.

"5. Assignor and Assignee hereby acknowledge that the Assignor's right to complete settlement under the Agreement of Sale is subject to an auction sale to be conducted in accordance with the Notice attached hereto. In the event that the Receiver obtains any bids with respect to the purchase of the Premises which bid shall be in excess of 110% of the proposed purchase price set forth in the Agreement, and satisfies all other terms and conditions of the Notice as may be determined by the Receiver in his sole discretion, then this Agreement shall be null and void and of no other force and effect and all notes paid under this Agreement shall be returned to Assignee."

I would like to see a copy of Allan Kluger's March 15, 1989 letter to Carrier concerning the return of the $200,000.00. Carrier is attempting to imply that we initiated the request for the return of the $200,000.00 deposit. The fact that Carrier chose to allow the deposit to remain in escrow during March has little to do with

their request for the return of the deposit after the May 26, 1989 $1,631,000.00 bid by Carrier.

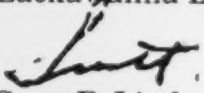
I believe it is important that I would have very limited recourse at law to require Carrier to consummate the Assignment after the release of the escrow funds, if they chose not to voluntarily honor the terms and conditions of the Assignment.

Tom, I would also consider objecting to the partial "crossing out" of parts of Paragraph 4, page 2, in the Exhibit "A" of Carrier's Motion as copied to me.

After you have reviewed this memo please call me to schedule a meeting as soon as you feel it would be helpful.

Best Personal Regards,

Lackawanna Land & Energy



Scott F. Linde
President

SFL:ck

HOURIGAN, KLUGER, SPOHRER & QUINN

LAW OFFICES

(717) 823-9401
FACSIMILE (717) 829-3460

December 14, 1990

December 14, 1990

Thomas I. Vanaskie, Esquire
Dilworth, Paxson, Kalish & Kauffman
600 Penn Security Bank Building
Scranton, PA 18503-1862

RE: Carrier Coal and Linde

Dear Tom:

You have asked me to advise you what my conversation was with Murray Ufberg in reference to the return of the $200,000.00 deposit in the above-entitled matter.

My recollection is that Murray Ufberg contacted me to discuss the return of the $200,000.00 and said his client would accept the $200,00.00 but it was not to effect the agreement of September 2, 1988 between Carrier and Linde. I agreed that the $200,000.00 refund would not effect this agreement.

Should you still have any questions concerning my position in this matter, please feel free to call me.

Sincerely,

Allan M. Kluger

AMK:sh
cc: Murray Ufberg

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-5802

UNITED STATES OF AMERICA

Appellee

TABOR COURT REALTY

APPEAL OF CARRIER COAL ENTERPRISES,
PARTY TO ASSINMENT OF AGREEMENT OF SALE

Appellant

Appeal From The Order Entered on August 15, 1990
By The United States District Court For The Middle
District of Pennsylvania In C.A. No. 80-1424

RESPONSE OF CARRIER COAL ENTERPRISES TO COURT'S REQUEST FOR SUPPLEMENTAL INFORMATION

ROSENN, JENKINS & GREENWALD

JOHN G. WHELLEY, JR., ESQUIRE
FRANCES G. WENZEL, ESQUIRE
JOSEPH G. FERGUSON, ESQUIRE

Attorneys for Carrier Coal Enterprises

Response of Carrier Coal Enterprises to Court's Request For Supplemental Information

Carrier Coal Enterprises, the Appellant in this action, hereby submits the following response to this Court's request for supplemental information in this matter:

1. As to the correspondence related to the deposit and return to the escrow funds, Carrier attaches the following:

A. The Declaration of Murray Ufberg, Esquire submitted by Carrier in support of its Motion for Summary Judgment in the action for specific performance presently pending before the District Court at No. 3:CV-90-1731 with the following exhibits:

1. March 29 letter from Robert Spielman, Esquire to Allan Kluger, Esquire stating that "Carrier prefers to permit its payment to remain in escrow

until the issues raised by Mr. Linde are resolved by the Third Circuit."

2. December 14, 1990 letter from Mr. Kluger to Thomas I Vanaskie, Esquire advising him that he agreed with Carrier's counsel that the "$200,000,00 refund would not effect [sic] the agreement [the Assignment]

B. The May 30, 1989 letter of Mr. Ufberg to Mr. Kluger requesting the return of the escrow money with attachment.

C. The May 31, 1989 letter of Mr. Ufberg to George B. Myrtetus of Carrier forwarding the check and reiterating his Agreement with Mr. Kluger that "the return of these monies to Carrier does not invalidate the Assignment for purposes of the Linde Appeal . . . but only, by mutual Agreement, obviates the need for escrowed funds in connection therewith."

D. The November 15, 1990 letter from Mr. Ufberg to Mr. Kluger outlining the Agreement reached regarding the return of the money.

2. As evidenced by the above-referenced correspondence, the funds were in fact returned to Carrier.

3. The check was deposited by Carrier on June 1, 1989 in Carrier's Money Market Account at Chemical Bank Account No. 005047838.

4. Carrier has no information concerning the fair market value of Marvine Colliery tract.

Respectfully submitted

ROSENN, JENKINS & GREENWALD

JOHN G. WHELLEY, JR., ESQUIRE
FRANCIS G. WENZEL, ESQUIRE
JOSEPH G. FERGUSON, ESQUIRE
15 South Franklin Street
Wilkes-Barre, PA 18711
(717) 826-5600

CERTIFICATE OF SERVICE

JOSEPH G. FERGUSON, ESQUIRE, hereby certifies that on this 27th day of February, 1991 he forwarded a true and correct copy of the Response of Carrier Coal Enterprises to Court's Request For Supplemental Information by U.S. First Class Mail, postage pre-paid to:

Thomas I. Vanaskie, Esquire
Dilworth, Paxson, Kalish & Kauffman
600 Penn Security Building
Scranton, PA 18501

Thomas P. Brennan, Esquire
Gallagher, Brennan & Gill
300 First Eastern Plaza
60 Public Square
Wilkes-Barre, PA 18701

ROSENN, JENKINS & GREENWALD

BY: _____
JOSEPH G. FERGUSON ESQUIRE
15 South Franklin Street
Wilkes-Barre, PA 18711

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARRIER COAL ENTERPRISES, Plaintiff vs. SCOTT F. LINDE, et.al, Defendants	3:CV-90-1731 Notice of Removal Filed September 28, 1990 (Judge Muir)

DECLARATION OF MURRAY UFBERG IN SUPPORT OF THE MOTION FOR SUMMARY JUDEGEMENT OF CARRIER COAL ENTERPISES

MURRAY UFBERG, ESQUIRE, being duly sworn deposes and says:

1. I am the managing partner of the law firm of Rosenn, Jenkins & Greenwald in Wilkes-Barre, Pennsylvania.

2. Rosenn, Jenkins & Greenwald represents CARRIER COAL ENTERPRISES ("Carrier") in the above-captioned matter and represented CARRIER at all times relevant to this matter.

3. On September 2, 1988, CARRIER entered Into an Assignment with Scott F. Linde ("LINDE") by which LINDE agreed to assign to CARRIER his interests in an Agreement of Sale which he had entered into with Thomas J. Kiley, Receiver of Raymond Colliery Co., Inc. (the "Receiver").

4. Pursuant to the terms of the Assignment, CARRIER paid Two Hundred Thousand ($200,000.00) Dollars to be held in escrow pending completion of the transaction contemplated by the Assignment.

5. In March of 1989, after this Court's decision of January 24, 1989, LINDE, through his counsel, Attorney Allan Kluger, attempted to return the Two Hundred Thousand ($200,000.00) Dollars to CARRIER.

6. By letter dated March 29, 1989, CARRIER, through Robert Spielman, a partner, then an associate, with Rosenn, Jenkins & Greenwald, informed Attorney Kluger that it preferred "to permit its payment to remain in escrow until the issues raised by Mr. Linde are resolved by the Third Circuit." Attorney Spielman's letter is attached hereto as Exhibit 1.

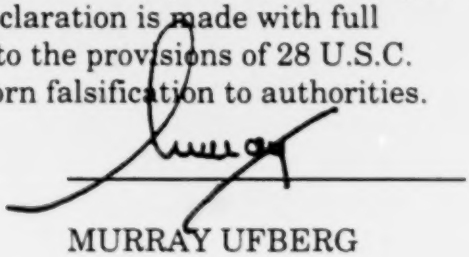
7. In May of 1989, in my capacity as Carrier's counsel, I agreed with Attorney Kluger to accept the return of the Two Hundred Thousand ($200,000.00) Dollars.

8. During the phone conversation in which I accepted the return of the Two Hundred Thousand ($200,000.00) Dollars, Attorney Kluger, acting as LINDE's counsel, agreed that the return of the money did not constitute a waiver by CARRIER of any of its rights under the Assignment and did not alter or impair the enforceability of the Assignment in any way.

9. In late November, 1990, I contacted Attorney Kluger, reminded him of our agreement and asked that he contact Attorney Vanaskie and attest to the existence of that agreement.

10. By letter dated December 14, 1990, Attorney Kluger informed Attorney Vanaskie that he had agreed with me "that the Two Hundred Thousand ($200,000.00) Dollars refund would not effect the agreement [Assignment]" A copy of Attorney Kluger's letter is attached hereto as Exhibit 2.

11. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment. This Declaration is made with full knowledge and subject to the provisions of 28 U.S.C. §1746 relating to unsworn falsification to authorities.



MURRAY UFBERG

LAW OFFICES
ROSENN, JENKINS & GREENWALD
15 SOUTH FRANKLIN STREET
WILKES-BARRE, PENNSYLVANIA 18711
TELEPHONE
717-826-5600
TELECOPIER
717-826-5640
DIRECT DIAL
717-826-5638
ATTORNEY OFFICE
49 SOUTH MAIN STREET
ATTORNEY, PA 18640

March 29, 1989

Allan M. Kluger, Esq.
Hourigan, Kluger, Spohrer & Quinn
Suite 700
United Penn Bank Building
Wilkes-Barre, PA 18701-1867

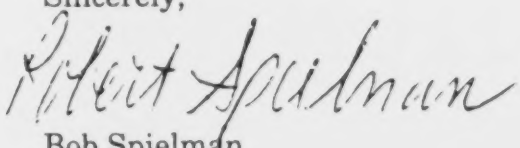
RE: Raymond Colliery Co., Inc.

Dear Allan:

Murray Ufberg asked me to respond to your letter of March 15, 1989, in which you proposed the return of the escrowed $200,000.00 payment which had been made by Carrier Coal Enterprises ("Carrier") in accordance with the assignment agreement between Carrier and your client, Scott F. Linde. Since Mr. Linde has appealed Judge Muir's decision concerning the legal propriety and enforceability of the assignment agreement, Carrier prefers to permit its payment to remain in escrow until the issues raised by Mr. Linde are resolved by the Third Circuit. If you have any objections to this suggestion, please contact me.

Incidentally, since the escrowed funds are earning interest, it is Carrier's understanding that it will be entitled to the return of the accrued interest as well as the $200,000.00 principal, should the Third Circuit find the assignment agreement to be unenforceable or otherwise legal invalid. If your understanding differs, please also contact me.

Sincerely,



Bob Spielman

RS:gr
cc: Mr. George B. Myrtetus
Murray Ufberg, Esq.
Mark A. Van Loon, Esq.

HOURIGAN, KLUGER, SPOHRER & QUINN

LAW OFFICES

WILKES-BARRE, PENNA. 18701-1887

(717) 825 6401

FACSIMILE (717) 829 3460

December 14, 1990

December 14, 1990

Thomas I. Vanaskie, Esquire
Dilworth, Paxson, Kalish & Kauffman
600 Penn Security Bank Building
Scranton, PA 18503-1862

RE: Carrier Coal and Linde

Dear Tom:

You have asked me to advise you what my conversation was with Murray Ufberg in reference to the return of the $200,000.00 deposit in the above-entitled matter.

My recollection is that Murray Ufberg contacted me to discuss the return of the $200,00.00 and said his client would accept the $200,000.00 but it was not to effect the agreement of September 2, 1988 between Carrier and Linde. I agreed that the $200,000.00 refund would not effect this agreement.

Should you still have any questions concerning my position in this matter, please feel free to call me.

Sincerely,

Allan M. Kluger

AMK:Sh
cc: Murray Ufberg

EXHIBIT "B"

LAW OFFICES
ROSENN, JENKINS & GREENWALD
15 SOUTH FRANKLIN STREET
WILKES-BARRE, PENNSYLVANIA 18711
TELEPHONE
717-826-5600
TELECOPIER
717-826-5640
DIRECT DIAL
717-826-5638
HYATTSTON OFFICE
717-864-3733
49 SOUTH MAIN STREET
HYATTSTON, PA 18640

May 30, 1989
HAND DELIVERED

Allan M. Kluger, Esq.
Hourigan, Kluger, Spohrer & Quinn
700 United Penn Bank Building
Wilkes-Barre, PA 18701

Re: Carrier Coal Enterprises Distribution Account

Dear Allan:

Enclosed is the original withdrawal for $ 200,000.00 from the account above-captioned. I would appreciate your forwarding the check for $200,000.00 to me today, made payable to Carrier Coal Enterprises, and would furthermore be most appreciative if you would also obtain a check for the interest, made payable to our client, after you have had an opportunity to verify the appropriateness of doing so with the Lindes.
Many thanks for your assistance.

With best regards, I am

Sincerely,

MURRAY UFBERG

MU/rst
enc.
bcc: Messrs. Michael Steinberg and
George Myrtetus
Mark A. Van Loon, Esq.
William L. Higgs, Esq.

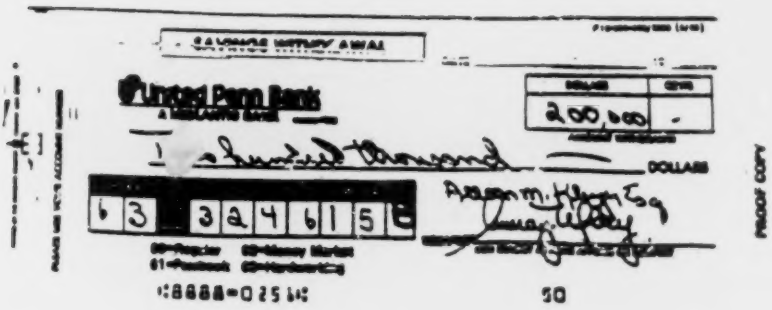

Standard Form Bank
200,000
DOLLARS
PROOF COPY
50

EXHIBIT "C"

LAW OFFICES
ROSENN, JENKINS & GREENWALD
15 SOUTH FRANKLIN STREET
WILKES-BARRE, PENNSYLVANIA 18711
TELEPHONE
717-826-5600
TELECOPIER
717-826-5640
DIRECT DIAL
717-826-5638
HYTTETON OFFICE
717-884-3738
49 SOUTH MAIN STREET
HYTTETON, PA 18640

FEDERAL EXPRESS

May 31, 1989

Mr. George B. Myrtetus
Carrier Coal Enterprises
1 1 East 44 Street, suite 1 700
New York, NY 10017

Re: Assignment of Agreement of Sale between Scott F. Linde and Carrier Coal Enterprises

Dear George:

In accordance with our understanding, I have requested and received and enclose herewith a Cashier's Check for $206.805.67. representing the escrow principal of $200.000.00. together with $6,805.67 in interest, held in Escrow pursuant to the Assignment of Agreement of Sale with Scott F. Linde, dated September 2, 1988.

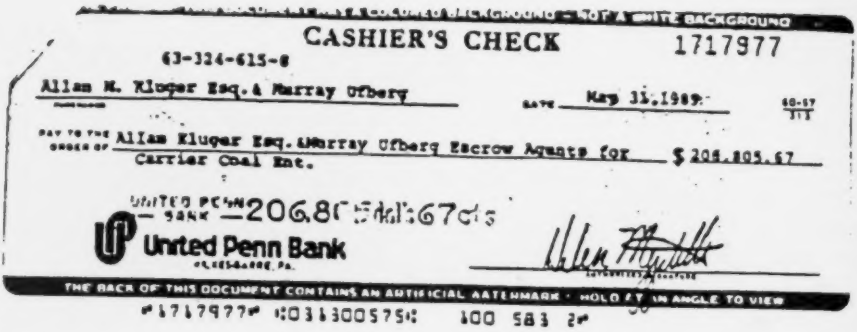
In my discussion with Allan Kluger, it was understood that the return of these monies to Carrier does not invalidate the assignment for purposes of the Linde Appeal, which is presently before the Third Circuit Court of Appeals but only, by mutual agreement, obviates the continued need for escrowed funds in connection therewith.

Both Allan and I have endorsed the Cashier's Check and I have made it payable to the order of Carrier Coal Enterprises. As always, if you have any questions, please let me know. With best regards, I am

Sincerely,

MURRAY OFBERG

MU/rst
enc.
cc: Robert Spielman, Esq.



CASHIER'S CHECK 1717977

63-324-615-8

Allan M. Kluger Esq.& Murray Ufberg DATE May 31,1989 40-57/313

PAY TO THE ORDER OF Allan Kluger Esq.&Murray Ufberg Escrow Agents for Carrier Coal Ent. $ 204,805.67

UNITED PENN BANK 206805675

United Penn Bank

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK - HOLD AT AN ANGLE TO VIEW

#1717977# :031300575: 100 583 2#

EXHIBIT "D"

LAW OFFICES
ROSENN, JENKINS & GREENWALD
15 SOUTH FRANKLIN STREET
WILKES-BARRE, PENNSYLVANIA 18711
TELEPHONE
717 826-5800
TELECOPIER
717 826-5840
DIRECT DIAL
717 826-5638
HITTSTON OFFICE
717 883-3732
49 SOUTH MAIN STREET
HITTSTON, PA 18640

November 15, 1989

Allan Kluger, Esq. HAND DELIVERED
Hourigan, Kluger, Spohrer & Quinn
700 United Penn Bank Building
Wilkes-Barre, PA 18701

Re: Assignment of Agreement between Scott F. Linde and Carrier Coal Enterprises

Dear Allan:

As I had advised you yesterday afternoon, we were shocked to learn that Tom Vanaskie had suggested in his Answer to Petition for Panel Rehearing, addressed to the Third Circuit Court of Appeals, that " ... After Carrier Coal Enterprises ("Carrier") failed to timely appeal, Linde executed a second Assignment of his interest under the Agreement of Sale, this time to Lackawanna Land & Energy, Inc., for additional support in prosecuting this Appeal." In addition, Carrier accepted the return of the sum of $200,000.00 which had been paid in escrow upon the execution of the Assignment. This refund was consistent with the terms of the Assignment, which provided that if the District Court disapproved the Assignment, "All monies paid pursuant to this Agreement shall be returned to Assignee and the parties released from further liability under this Agreement."

Later in the Brief, Mr. Vanaskie goes on to state that Carrier did adopt "in full" the Brief filed by Linde. "However, while this Appeal was pending, Carrier demanded reimbursement of the $200,000.00 it had furnished at the time of the Assignment (emphasis supplied). Linde promptly acceded to this request since he understood that the return of the deposit was consistent with his belief that the Assignment was now a legal nullity."

Allan, factually, the matter of the return of the $200,000.00 was first broached by you to me in correspondence of March 15, 1989. In our initial discussion thereafter, we agreed that, whether our client wanted the money or not, your intent in making the offer was only to eliminate further administration of the money and was not intended to obviate the Assignment. Nevertheless, in response to that suggestion, Bob Spielman, of our office, wrote to you and suggested that Carrier preferred to allow the money to remain in escrow for the time being and until the issues raised by Mr. Linde were resolved by the Third Circuit.

Subsequent to that, you and I had several conversations including one in which the matter of Linde's attempted assignment of the Agreement to Lackawanna Land & Energy, Inc., was raised. You will recall that I asked you how Linde had attempted to assign to a second party when our Assignment was still in effect and you assured me that you knew nothing about this, since the matter was now being handled by Vanaskie but you assured me that you would get back to me on the issue. We also discussed, on May 30th, the matter of the return of the $200,000.00 in the context of that proposed second Assignment and I told you, and you verified your understanding, that only if the Lindes were to agree to the continuing validity of the Assignment, would we have no objection to the money being returned while the matter was before the Third Circuit Court of Appeals.

You called and advised me that this was acceptable and sent over the withdrawal slip, which I executed. Parenthetically, there was clearly no reason for us to have accepted funds from Linde which would invalidate the Assignment while the Appeal was ongoing and particularly after I had objected to the validity of that purported "second" Assignment. In any event, I enclose a copy of my correspondence to you, together with my hand-written notes thereon and a copy of my letter to our clients the following day which verifies clearly that my understanding with you was that the return of the monies to Carrier was predicated upon the continued validity of and did not in any way invalidate the Assignment for purposes of the Linde Appeal. Furthermore, two months or so later, we argued before the Third Circuit based upon the continued applicability of the Assignment, without any suggestion that this wasn't the case.

Allan, apart from the written documentation in your file, I would hope that you would search your recollection as carefully as possible so as to confirm the understanding which we had and which is entirely clear in my file and in my own recollection. Tom Vanaskie has advised that after you have had an opportunity to review the relevant portions of his Brief and the contents of your file, which I hope is assisted by what I have provided you herein, that if you are convinced, as I am, that the return of the monies was conditioned upon the understanding that there would be no change in the status of the parties, he will withdraw that contention in his Brief.

I have left word for you and, if you are able to meet with me for a few moments upon your return to Wilkes - Barre this afternoon, I would appreciate your calling.

Sincerely,

MURRAY C. GREENBERG

MU/rst
enc.
bcc: Mark A. Van Loon, Esq.
Robert Spielman, Esq.

Filed September 5, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5802

UNITED STATES OF AMERICA
v.
TABOR COURT REALTY CORP.; RAYMOND COLLIERY CO., INC.; McCLELLAN REALTY CO., INC.; LACKAWANNA COUNTY; PAGNOTTI ENTERPRISES, INC.; LORREE ASSOCIATES; JAMES J. TEDESCO; HENRY VENTRE; LOUIS PAGNOTTI II; BLUE COAL COMPANY; GILLEN COAL MINING CO.; CARBONDALE COAL CO.; MOFFAT PREMIUM ANTHRACITE; NORTHWEST MINING, INC.; MAPLE CITY COAL CO,; POWDERLY CORPORATION; CLINTON FUEL SALES, INC.; GREAT AMERICAN COAL CO.; JOSEPH SOLFANELLI, individually and as trustee; GENERAL ELECTRIC CREDIT CORP.; COMM. OF PA. DEPT. OF MINES & MINERAL INDUSTRIES, DEPT OF ENVIRONMENTAL RESOURCES and DEPT. OF REVENUE; BOROUGH OF OLYPHANT; JOHN J. GILLEN; THOMAS J GILLEN; ROBERT W CLEVELAND & SONS; WILLIAM T KIRCHOFF; JAY W. CLEVELAND; ROYAL E. CLEVELAND; CITY OF SCRANTON SEWER AUTHORITY; LACKAWANNA RIVER GLENEAGLES INVESTMENT CO., INC.; JEDDO HIGHLAND COAL CO.; OLYPHANT PREMIUM ANTHRACITE, INC.; OLYPHANT

ASSOCIATES; MININDU CORPORATION; GLENNAN, INC.; GILCO, INC.; JAY W. CLEVELAND, As Administrator of the Estate of Royal E Cleveland

CARRIER COAL ENTERPRISES ('Carrier"), Apellant

Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. CivII ActionNo. 80-01424)

Argued March 6, 1991

Before: BECKER, NYGAARD and HIGGINBOTHAM, Circuit Judges,

(Filed September 5, 1991)

JOHN G. WHELLEY, JR., ESQ. (Argued)
FRANCIS G WENZEL, JR., ESQ.
JOSEPH G. FERGUSON, ESQ.
Rosenn, Jenkins & Greenwald
15 South Franklin Street
Wilkes-Barre, PA 18711

Counsel for Apellant,
Carrier Coal Enterprises

THOMAS I. VANASKIE, ESQ. (ARGUED)
THOMAS D. BROWN, ESQ.
Dilworth, Paxson, Kalish & Kauffman
600 Penn Security Bank Building
Scranton PA 18503

GEORGE A SPOHRER, ESQ.
Hourigan, Kluger, Spohrer & Quinn, P.C.
United Bank Building

Suite 700
Wilkes-Barre, PA 18701

Counsel for Appellee, Scott F. Linde

THOMAS P. BRENNAN, ESQ.
Gallagher, Brennan & Gill
300 Eastern Plaza
60 Public Square
Wilkes-Barre, PA 18701

Counsel for Appellee, Thomas H. Kiley,
Receiver for Raymond Colliery Co., Inc.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, Circuit Judge

This appeal is from the denial of Appellant's motion for an order directing a court-appointed Receiver to convey property pursuant to an assignment of an Agreement of Sale. Subject matter jurisdiction in the district court was based on 28 U.S.C. §1331 and 26 U.S.C. §7402(a). This court has appellate jurisdiction pursuant to 28 U. S. C. §1291.

I.

This dispute arises out of the district court's protracted efforts to dispose of the foreclosed upon properties of the Raymond Colliery Co., Inc.. Thomas H. Kiley, Receiver of the properties, was authorized by the district court to seek purchasers and apply to the court for approval of the sale. (App. at 38). The highest appraisal value for the land and coal was $1,283,294. The Receiver was authorized to receive not less than 110% of the appraised value of the property (i.e., $1,411,234). (App. at 40). Scott F. Linde began negotiations with the Receiver for the seven parcels of land in May, 1988.[1]

The Receiver provided Linde with a copy of a proposed Agreement of Sale which expressly prohibited assignment of the agreement without the Receiver's written approval. Linde's co-investors only agreed to invest, however, on the condition that the entire agreement of sale be assignable to Carrier Coal Enterprises. (App. at 850). At a meeting with the Receiver on May 20, 1988. Linde requested two modifications of the agreement which the Receiver granted without consulting his counsel - 1) the agreement was modified to divide the realty transfer taxes equally between buyer and seller; and 2) the paragraph prohibiting assignment without the Receiver's written permission was deleted and the buyer designated as "Scott F. Linde or his assigns." (emphasis added). The agreement of sale was then executed under the above conditions for $1,483,000. There is no evidence of record that Linde had any discussion with Carrier concerning the subject matter of the agreement of sale prior to entering into the agreement of sale with the Receiver. (App. at 851).

The First Public Sale

On August 8, 1988, the district court approved the agreement of sale on the condition that the sale was subject to certain requirements. The requirements included advertisement of the sale, the acceptance of higher bids and final confirmation by the court. (App. at 853). The advertisement provided that until 10:00 a.m., September 2, 1988, any person might bid on the land so long as the purchase price was not less than 110% (i.e. $1,631,300) of the price that Linde was to pay.

1. The parcels of land encompass approximately 652 acres and were encumbered with mine refuse banks that are subject to term leases and term deeds held by Carrier Coal Enterprises.

Two weeks prior to September 2, 1988, Marray Ufberg, attorney for Carrier, telephoned Alan Kluger, attorney for Linde, and proposed the assignment. Kluger asked for $200,000 plus a reconveyance of one of the parcels of land[2] which had an appraised value of $74,000. (Supplemental Briefing Documents). On September 2, 1988, Linde and Carrier negotiated in the hallway outside of the Receiver's office for approximately fifteen minutes and agreed to the assignment.[3] The parties then informed the Receiver, in his office, that Linde would be assigning his rights to Carrier and Carrier would not be submitting a bid to the Receiver. (App. at 855-56). Although the Receiver voiced his disapproval, the parties returned to the hallway and finalized the assignment agreement.

On September 13, 1988, the Receiver, believing that Linde had breached the agreement of sale by the assignment to Carrier, refused to proceed with the sale, and filed a motion to impose remedies for unlawful interference with a court directed sale of real property. (App. at 47). The Receiver maintained that Linde had breached the agreement and that the assignment was collusive and an unlawful frustration of the bidding process. Both Linde and Carrier opposed the Receiver's motion.

Disapproval of the Assignment & The Second Public Sale

On January 9, 1989, the district court ordered a hearing to determine if Linde and Carrier had entered into a collusive agreement. On January 24 1989, the district court found that the assignment improperly stifled the competitive bidding process and depressed the price to be paid to the Receiver. (App. at 140). The court expressed the belief that it was not necessary to decide whether there was actual collusion between Carrier and Linde (App. at 145).

2. This parcel of land is known as the Marvin Bank #6 tract.
3. The written agreement between the parties provided that Kluger and Ufberg were to serve as escrow agents. The agreement also provided that upon approval of the sale, Linde would be entitled to the interest accrued on the $200,000.

The court invalidated the sale to Linde, explicitly disapproving the assignment between Carrier and Linde, and ordered the Receiver to reopen the bidding process.

Linde appealed the district court's decision, filing a Notice of Appeal on February 22, 1989. On March 29, 1989, the district court denied Linde's motion to stay the bidding proceedings pending appeal. In keeping with the district court's holding that the sale to Linde was invalid, the Receiver scheduled a second public sale. At the second public sale on May 26, 1989, Carrier offered, and the Receiver accepted, a bid of $1,631,300, the minimum required bid. Linde opposed approval of the sale to Carrier arguing that the first sale was valid.

Return of the Escrowed Assignment Funds

On March 15, 1989, Allan Kluger, one of Linde's attorneys who was also acting as Escrow Agent, wrote to Murray Ufberg, Carrier's attorney and the other Escrow Agent. In that letter, Kluger proposed to return the $200,000 assignment payment to Carrier. "It would appear to me that in view of the decision of Judge Muir, the money should be returned to your client." (Supp. Briefing, Exhibit o). On March 29, 1989, Carrier's other attorney, Robert Spielman, stated that Carrier preferred to permit the payment to remain in escrow until the appeal of "Judge Muir's decision concerning the legal propriety and enforceability of the assignment agreement" was resolved. (Supp. Br. Exhibit E). Spielman also added that it was Carrier s understanding that it would be entitled to the return of the accrued interest in addition to the principal if the Third Circuit found that the assignment agreement was unenforceable or otherwise legally invalid.

On May 30, 1989, Murray Ufberg wrote to Allan Kluger requesting that he "forward a check to him today made payable to Carrier." (Carrier Supp. Briefing, Exhibit B) . Ufberg also requested that Kluger obtain a check for the interest made payable to Carrier, "after you have had an opportunity to verify the appropriateness of doing so with the Lindes." (Carrier Supp. Briefing, Exhibit B). On May 31, 1989, after receiving the check for $206,805.67, Ufberg forwarded it to Carrier, explaining that he and Kluger had agreed that the return of the money did not invalidate the assignment for the purpose of the Linde appeal pending before the Third Circuit. The appeal only obviate[d] the continued need for escrowed funds in connection therewith.- (Carrier Supp. Briefing Exhibit C).

Following the Third Circuit's reversal of the district court's disapproval of the sale, Ufberg wrote to Kluger on November 15, 1989 to protest Linde's statement in its response to Carrier's motion for rehearing (discussed below) that Carrier had requested the return of the money. "In our initial discussion (following Kluger's offer to return the money) we agreed that, whether our client wanted the money or not, your intent in making the offer was only to eliminate further administration of the money and was not intended to obviate the Assignment.-- (Carrier Supp. Brief Exhibit D). On December 14, 1989, Kluger (Linde's attorney) wrote to Thomas Vanaskie (Linde's appellate counsel) explaining his agreement with Ufberg that the return of the $200,000 would not affect the assignment. (Linde Supp- Brief, Exhibit H).

Linde's Appeal to the Third Circuit

On appeal to the Third Circuit, Linde's appellate brief argued that he had the right under the agreement of sale to assign his interest. He requested that the district court's January 24, 1989 order be reversed and that the court be required to enforce the agreement between Linde and the Receiver. Carrier filed a separate two-page brief in which it adopted Linde's brief in full and raised an additional argument about allegedly imprecise bidding procedures leading Carrier to enter into the assignment.[4] On July 10, 1989, at oral argument, Linde ceded three minutes of its time to Carrier to make its above-described argument.[5]

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4. According to Carrier, it was unclear as to whether a written bid made prior to 10 a.m. or an oral bid made after 10 a.m. would determine the outcome. (App. at 403).

5. THE COURT: Proceed.

MR VANASKIE: Thank you, Your Honor. In addition, I should note I have ceded three minutes of my time to counsel for Carrier Coal, though an Appellee, has joined in our brief.

(App. at 437).

In an unpublished memorandum opinion, dated October 12, 1989, the panel concluded that neither the inadequacy of the purchase price nor the assignment to Carrier was a sufficient reason for the district court to set aside the assignment or refuse final approval of the sale absent collusion, fraud, unfairness or mistake in the conduct of the sale. The district court's January 24, 1989 order was reversed and the matter was remanded to the district court with instructions to "either enter an order confirming the sale from the Receiver to the appellant or to conduct a further hearing to determine if there was any collusion in the conduct of the sale." (App. at 493).

Carrier's Request for Panel Rehearing

On October 17, 1989, counsel for Carrier, Mr. Spielman, communicated by letter (and later in a request for panel rehearing) his belief that the Court of Appeals should have directed the district court to convey the property to the appellant's assignee (i.e., Carrier). To do otherwise, he argued, would be to order the district court to do exactly what it had been reversed on - disapproval of the assignment. Linde opposed this request arguing that he had not appealed the disapproval of the assignment to Carrier - rather, he had appealed the district court's refusal

to grant final approval of the sale because the refusal was based on Linde's assignment to Carrier. Linde also stated that, following Carrier's failure to timely appeal the district court's disapproval of the assignment, he had executed a second assignment to Lackawanna Land & Energy "for additional support in prosecuting [the] appeal." (App. at 510). Scott F. Linde is a principal shareholder and Vice-President of Lackawanna Land & Energy.

Carrier's petition for rehearing was denied by the Court of Appeals on December 21, 1989. (App. at 500). Although the petition was filed by Carrier, which referred only to itself as the "party to the agreement" or "appellant's assignee", the panel in its denial erroneously described the petition as one filed by the "appellant." (App. at 525).[6]

Proceedings on Remand

On remand, the district court conducted an extensive hearing on the question of collusion and concluded on May 23, 1990 that there had been no collusion between Carrier and Linde in the conduct of the September 2, 1988 sale. (App. at 845). The court decided that although there was evidence that Linde may have fraudulently induced the Receiver to alter the contract, this was an insufficient ground to set aside the sale absent evidence that Carrier knew of the fraud. (App. at 14-15). Accordingly, the district court ordered that

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6. Technically, Carrier had no standing since it was not an appellant in the case. Its appearance status at oral argument was more as an *amicus* rather than as an appellant of record.

the original sale to Linde under the terms of the Agreement of Sale was confirmed. (App. at 863).

Carrier's Motion for Conveyance

On May 30, 1990, Carrier requested the Receiver to convey the property to Carrier as Linde's lawful assignee. (App. at 865). On May 31, 1990, Linde requested the Receiver to convey the property to Lackawanna Land & Energy as its lawful assign. (App. at 865). On June 1, 1990, the Receiver informed Carrier that it was unwilling to convey to Carrier. (App. at 866). On June 8, 1990, Carrier filed a motion with the district court - a "Motion for Entry of Order Directing Receiver to Convey Real Estate Interests.' (App. at 864). On August 15, 1990, the district court denied Carrier's motion reasoning that the motion was not a proper vehicle for a determination of Carrier's rights, if any, against Linde. The Receiver's function under the mandate of the Court of Appeals was and is to convey to Linde and he has no interest in the dispute between those parties."

(App. at 875). The district court also noted that "Carrier's rights under the assignment may have been extinguished by our disapproval of the assignment. Carrier may well have been obliged to appeal from our [January 24, 1989] order if it sought relief from our determination." (Id. citing *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937)).

Carrier's Appeal to the Third Circuit

On September 5, 1990, Carrier appealed the district court's denial of its motion.' On September 17, 1990, Carrier filed an action for specific performance In the Court of Common Pleas of Lackawanna County against Linde and the Receiver. On September 28, 1990, the Receiver removed the action to the District Court. On October 9, 1990, Linde and Lackawanna filed a Rule 12(b)(6) motion to dismiss Carrier's complaint. At that time, the district court determined that the issue was the validity and enforceability of the Assignment Agreement between Linde and Carrier. On January 10, 1991, Linde and Lackawanna's motion to dismiss Carrier's complaint was denied. The district court rejected Linde's argument that Carrier was precluded from enforcing the assignment because it had failed to appeal the initial district court decision.

II.

We note at the outset that the appointment of a receiver of a debtor's property by a federal court, confers upon the court federal .jurisdiction to decide all questions incident to the preservation, collection and distribution of assets whether such questions are raised in the original suit or ancillary proceedings. *Riehle v. Margolies*, 279 U.S. 218, 223 (1929). Therefore, it is proper for the district court in carrying out the sale of the foreclosed upon properties to convey' the property in accordance with the agreement of sale and any

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7. On November 5, 1990, the district court denied Carrier's motion to stay the conveyance to Linde pending the appeal.

relevant agreements pursuant thereto. Consequently, Carrier's motion to have the property conveyed to itself was a proper, albeit unorthodox, vehicle for a determination of to whom the property was properly conveyed.

Linde's Position on this Appeal

Before we discuss the jurisdictional implications of Carrier's failure to appeal the district court's January 24, 1989 order, we are compelled to comment on Linde's dramatic change in posture throughout this protracted effort to dispose of the Raymond Colliery properties. When we heard argument on Linde's appeal on July 10, 1989, Linde led this court[8] to believe that he and Carrier had a firm agreement and that the assignment was valid. This impression was reinforced when he yielded three minutes of his argument time to Carrier to allow Carrier to present its argument in favor of reversing the district court's order. Yet, when we reversed the district court's decree and validated the position that both Linde and Carrier had taken before this Court, Linde changed his stance and represented that he had believed all along that the assignment was invalid because Carrier did not file a formal appeal of the district court's order.

While we will refrain from making a moral judgment on this tactical approach, at a minimum we must convey our incredulity that, during the original oral argument, Linde was arguing solely for enforcement of the Receiver's agreement and

8. That panel was identical to the panel in this case - J. Becker, J. Nygaard, and J. Higginbotham.

not also for the validity of the assignment to Carrier. We consider Linde to have been less than forthright in attempting to deny that, at the time of the original appeal, both parties supported reversal of the district court's invalidation of the sale because of the assignment. Carrier probably was mistaken to have assumed that Linde would always have Carrier's best interests at heart. But it was not unreasonable for Carrier to assume that it was impossible for Linde to appeal only the invalidation of the Agreement of Sale without reaching the question of the assignment - the issue of whether the district court had a valid reason for disapproving the Assignment was always present.

We also do not consider Carrier's participation in the second .judicial sale to be of any consequence to the question of whether the assignment was invalidated by Carrier's failure to appeal. Carrier's participation in the second Judicial Sale may have indicated to the district court that Linde and Carrier were now competitors rather than partners. Carrier was simply playing both sides of the net in order to ensure that whatever the outcome of Linde's appeal, it was certain to get the property. In fact, Carrier was better off if Linde lost the appeal. As a result of its bid at the second Judicial Sale, Carrier would have gotten the property for $1,631,000. Under the original assignment agreement the property would cost Carrier approximately, $1,757,000. ($200,000 plus the value of the Marvine Colliery Tract). Linde's argument that Carrier's action in

participating at the second Judicial Sale served as some kind of express or implied repudiation of the Assignment is without merit.[9]

Effect of Carrier's Failure to Appeal

The sole question presented is the effect, if any, that Carrier's failure to file a notice of appeal as to the district court's disapproval of the assignment has on that court's ability to now enforce the assignment. Linde appealed the district court's invalidation of the sale on the basis of the assignment. We decided that the invalidation of the sale on the basis of the assignment was improper and that the property should be conveyed according to the Agreement of Sale which called for conveyance to Scott F. Linde or his assigns. *United States v. Tabor Court Realty*, et. al., Nos. 89-5157 & 89-5198, slip op. (3d Cir. Oct. 12, 1989). Because the question has continued to be the subject of some confusion we will clarify for the parties and for the court below, the effect that Carrier's failure to appeal had on our prior disposition of the case.

As a general rule, a party aggrieved by a decision of the district court must file an appeal in order to receive relief from the decision. *United States v. Hickey*, 84 U.S. (17 Wall.) 9, 13 (1872). As a result, an appellee who has not filed a cross-appeal may not "attack the decree with a

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9. Linde also argued in its brief that the return of the escrowed $200,000 cash consideration meant that Carrier had waived its right to the assignment. At oral argument, however, counsel for Linde conceded that this argument was a non-issue. See Oral Arg. Trscrpt. at 31. Having reviewed this argument in full, with the aid of supplemental briefing by the parties, we conclude that this question is indeed a "non-issue."

view either to enlarging his own rights thereunder or of lessening the rights of his adversary", *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937), *reh. den.* 300 U.S. 687 (1937) (quoting *United State of America v. American Railway Express Co.*, 265 U.S. 425, 435 (1924)). This rule, however, is one of practice generally followed and not a restriction on the power of the courts to see that justice is done. *Langnes v. Green*, 282 U.S. 531, 538 (1931). Although a timely, initial notice of appeal is mandatory and jurisdictional,[10] it has been the rule of this Circuit that Rule 4(a)(3), which provides additional time for filing cross or other separate appeals, is not a jurisdictional prerequisite. Rather it is a rule of

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10. In *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1415 (7th Cir. 1989), the court observed that Fed. R. App. P. 1 (b) provides that the Federal Rules of Appellate Procedure "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law."

Thus, the rules of appellate procedure do not, in a strict sense affect the subject matter jurisdiction of the courts of appeals.

However, the rules of appellate procedure have the force of law, 28 U.S.C. § 2072, and Rules 3 and 4 state conditions precedent for the *exercise* of the appellate jurisdiction granted by Article III and 28 U.S.C. § 1291. Although these conditions precedent are spoken of as 'mandatory and jurisdictional,' see e.g., *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 264, 98 S. Ct. 556, 561 (1978), the more precise effect of the rules is to state conditions which invoke the jurisdiction of the court. *Sanchez v. Board of Regents*, 625 F.2d 521, 522 n. 1 (5th Cir. 1980); *see also* 9 J. Moore & B. Ward, MOORE-S FEDERAL PRACTICE §§204.02121 at 4-14, 204.11151 at 4-59 (2d ed. 1991).

practice which may be waived in the interest of justice under appropriate circumstances. *Scott v. Univ. of Delaware*, 601 F.2d 76, 82-84 (3d Cir. 1979); *Finkielstain v. Seidel*, 857 F.2d 893, 895 (2d Cir. 1988); *Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 476 (8th Cir. 1977); *Rhoads v. Ford Motor Co.*, 514 F.2d 931, 934 (3d Cir. 1975). In *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1415-16 (7th Cir. 1989), the Seventh Circuit noted that there has been some disagreement, although not across clear or consistent boundaries, between the circuits as to whether the Rule is jurisdictional or a rule of practice. Whether the Rule is a mandatory one of jurisdiction or a rule of practice is clearly not required by the provision of Article III or §1291 . . . since both these provisions, as interpreted, deal with whole cases.... The relevant statute [28 U.S.C. § 2106] permits the courts of appeals to 'affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review.- Thus the rule that a party who did not file a notice of appeal may not ride in on a reversal or modification obtained by another party is a judicial gloss on both the rules and the statute to the effect that the rules require each party to file a notice of appeal, and therefore not the whole 'judgment, decree, or order' but only so much of it as affects the party appealing is 'lawfully brought before [the court of appeals] for review.' 9 J. Moore & B. Ward, MOORE'S FEDERAL PRACTICE §204. 1115] at 59 (2d ed. 1991).

Linde argues that the Supreme Court's treatment of a related issue In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct. 2405 (1988) indicates that Rule 4(a)(3) should also be applied as a jurisdictional requirement. At least two courts have concluded that *Torres* controls the issue of whether Rule 4(a)(3) is mandatory or waivable. *See Stockstill v. Petty Ray Geophysical*, 888 F.2d 1493, 1496 (5th Cir. 1989) (jurisdiction to review appeal by defendant who failed to file cross appeal from dismissal of claims against third party defendant doubtful in light of *Torres*); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d at 1416 (Torres controls the issue of whether defendant should be barred from challenging judgment entered for third party defendants where no cross-appeal taken).

In *Torres*, the Supreme Court granted certiorari to resolve a conflict between the circuits over whether the failure to file a notice of appeal in accordance with the specificity requirement of the Federal Rule of Appellate Procedure 3(c) presented a jurisdictional bar to the appeal. In an opinion by Justice Marshall, the Court held that the omission of one litigant-s name, due to a clerical error, in a notice of appeal filed by fifteen other intervenors in an employment discrimination suit constituted a failure of that party to appeal. In so holding, the Court expressed the belief that "the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal." *Torres*, 108 S. Ct. at 2408. The Court was influenced to some extent by the Advisory Committee Note following Rule 3 which states:

> Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional,' [citation omitted] compliance with the provisions of those rules is of the utmost importance. 28 U.S.C.App., p. 467. Torres, 108 S. Ct. at 2408.

Although the Court acknowledged that a court may construe the rules liberally in determining whether they have been compiled with, it emphasized nonetheless that a court "may not waive the jurisdictional requirements of Rules 3 and 4. Torres, 108 S. Ct. at 2409.

We are not of the opinion that Torres controls the issue in this case. The Supreme Court's discussion does not present any definitive statement as to whether or not a cross-appeal is mandatory or jurisdictional. The opinion certainly indicates that the Supreme Court intended to streamline compliance with initial notice of appeal specificity requirements. Although the opinion contains seemingly broad language discussing the jurisdictional aspects of Rule 3 or 4, neither the language nor the decision goes beyond a clarification of the point at which non-compliance with the Rules' requirements goes impermissibly beyond that allowed by even a liberal construction of the rules.

But although a court may construe the rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirement of Rules 3 and 4, even for "good

cause shown" under Rule 2. if it finds that they have not been met.

Torres. 108 S. Ct. at 2409. Therefore, we conclude that the Court's reference to the .jurisdictional aspects of Rules 3 and 4 does not indicate that Rule 4(a)(3) is not properly applied as a rule of practice.

The fact is that the presence or lack of a formal cross-appeal will not always determine a court's ability to consider certain issues that are raised by parties to the appeal but also pertain to parties who are not formally participating in the appeal. Indeed, in some cases, the rights of the parties are so closely tied together that an appellate court can render no judgment that would be just without affecting the rights of parties who did not file notices of appeal. See *Hysell v. Iowa Public Service Company*, 559 F.2d 468, 476 (8th Cir. 1977) *Arnold's Hofbrau, Inc. v. George Hyman Construction Co.*, 480 F.2d 1145, 1150 (D.C. Cir. 1973); 9 J. Moore & B. Ward, MOORE'S FEDERAL PRACTICE. § 204.11[5] at 59-66 (2d ed. 1991); *see also Young Radiator v. Celotex*, 881 F.2d at 1415 (surmising that in those Circuits which have held that Rule 4(a)(3) is a rule of practice, "the basic rationale is that the initial notice of appeal invokes jurisdiction over the whole case so that the appellate court has the power to overlook the absence of a Rule 4(a)(3) notice and to reverse or otherwise modify a non-appealed judgment or ruling in order to fully adjudicate the appeal before it). At the very least, in such cases there can be no question that the initial notice of appeal invokes jurisdiction over the whole case. In order to fully adjudicate the appeal before it, an

appellate court will necessarily have the power to overlook the absence of a 4(a)(3) notice and to reverse or otherwise modify a non-appealed judgement or ruling. *See Langnes v. Green*, 282 U.S. at 538, 51 S. Ct. at 246. In light of this distinction, the *Torres* holding is not readily transferable to the question of whether or not Rule 4(a)(3) is jurisdictional or a rule of practice.

The case at hand presents just such a case where the disposition as to one party is inextricably intertwined with the interests of a non-appealing party so as to make it impossible to grant relief to one party without granting relief to the other. Linde contends that because Carrier did not file a separate appeal, the issue particular to Carrier at the time of the appeal (the correctness of the district court's invalidation of the assignment) was not before this court. According to this argument, the district court's explicit disapproval of the assignment still stands despite our decision that the first public sale was improperly voided. However, this argument ignores the fact that the relief we granted to Linde (the reinstatement of the sale) was premised on the fact that the assignment to Carrier was an improper basis upon which to void the sale. The validity of the assignment was indirectly considered in terms of whether it was proper to disapprove the sales agreement on the grounds that the assignment improperly stifled competitive bidding. We decided that absent collusion there was no reason to disapprove the sales agreement on the basis of the assignment:

> We conclude that unless there was collusion, fraud, unfairness or mistake in the

> conduct of sale, or the price brought at the sale was so grossly inadequate as to shock the conscience of the court and raise a presumption of fraud, unfairness or mistake, that neither inadequacy of the purchase price nor the assignment is sufficient reason for the district court to set aside the assignment or to refuse final court approval of the sale.

Tabor Court Realty. slip op. at 3. Therefore, the only conclusion to be drawn from our earlier opinion Is that the assignment to Carrier was still enforceable absent a showing of collusion.[11]

The case of *In re Barnett*. 124 F.2d 1005 (2d Cir. 1942) involves facts sufficiently analogous to this case which illustrate the difficulty of applying the cross-appeal rule as a jurisdictional requirement. In that case, a daughter had assigned her interest in her father's estate to her mother. When the daughter subsequently filed for bankruptcy, the trustee in bankruptcy petitioned for an order directing the daughter to assign her interest in the estate to the trustee. The daughter and her mother contested the petition in district court and lost. The daughter appealed the district court's decision but the mother and the executor did not file an appeal. The Court of Appeals reversed holding that the assignment to the mother was valid. The court found that the

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11. In order to understand this question better, it is helpful to consider what would have occurred on remand had collusion been found. If there had been collusion, the agreement of sale would have been invalid - thus the assignment would have been invalid also. In the absence of collusion, the only conclusion that the district court could reach was that the Agreement of Sale, with its assignment provision, was valid.

mother, as one of the parties below, and as the party for whose benefit the assignment was made, had obviously assumed that her rights would be brought before the court of appeals pursuant to the daughter's appeal and that a reversal of the district court's order would mean a reversal as to her.

> As previously observed, the other parties adversely affected by the lower court's order did not pray an appeal. Had they done so, it is clear, from our opinion, that we would have held the order erroneous as to them. We are clear that we have the power to order a reversal as to them even though they did not appeal and that we should do so under the circumstances here disclosed. The anomalous position of the parties otherwise, and the quite naturally embarrassing questions which would confront the state court if the order, stigmatized by us as erroneous, remains partially in effect, are patent.

Barnett, 124 F.2d at 1008-09. The court concluded that it was proper to render judgment as to the mother and the executor because to do otherwise would frustrate the relief afforded by the decision - "where reversal of the judgment wipe[d] out all basis for recovery against a non-appealing, as well as against an appealing defendant, the reversal may operate to the benefit of both." *Id.*

The Second Circuit's reasoning in *Barnett* applies squarely to this case. When Linde argued for the reversal of the district court's invalidation of the first public sale, all parties, including the Court itself, assumed that Carrier's rights were being adjudicated during the Linde appeal. Our reversal as to the district court's order operated to

both Linde and Carrier's benefit. Had Carrier filed an appeal, the outcome would not have been different.

III.

We conclude that the district court was bound by the terms of the agreement to convey the property to Scott Linde or his lawful assigns. Once a party holding a valid Assignment presented itself to the district court as the lawful assign, then the district court had no choice but to convey to that party.

Based on conflicting interpretations of a provision within the assignment agreement, Linde now argues that the lawful assign is Lackawanna Energy while Carrier claims that it is the lawful assign. Although both parties request us to decide the correct interpretation of the Assignment agreement, we decline to do so. In light of the odd posture of this case, where there is presently pending an action for specific performance which raises the same question the parties urge us to decide here, we will not infringe upon the district court's right to resolve this issue in conjunction with the instant opinion. Therefore, we will remand the action and order the district court to vacate its January 24, 1989 order and recommend that the court consolidate this case (Civil Action 80-1424) with Civil Action 90-1731 and render final decision on the case as a whole.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff vs. GLENEAGLES INVESTMENT COMPANY, INC., et al. and SCOTT F. LINDE, Party to Agreement of Sale	CIVIL NO. 80-1424 Reassigned to Judge Muir 3/5/81 (Complaint filed 12/12/80)

JOINT STATEMENT OF UNDISPUTED FACTS

I. PRELIMINARY STATEMENT

In accordance with this Court's order of January 9, 1990, the parties submit the following as their Statement of Undisputed Facts. The receiver and Scott F. Linde will submit separately additional proposed findings of fact which have been contested by the other. Carrier Coal Enterprises does not dispute any of the proposed findings submitted on behalf of Scott Linde.

Where appropriate, the source from which the Statement has been derived is indicated. The designation "FOF" refers to a Finding of Fact made by this Court based upon the evidentiary hearing conducted on January 18, 1989. If a Statement is derived from a desposition, the name of the deponent and page of the transcript supporting the Statement is provided. The designation "N.T." is used to signify that the source for the particular Statement is the Notes of Testimony of the January 18, 1989 evidentiary hearing. The designation "Linde Affidavit, ¶__ " signifies that the source for the Statement is the Affidavit of Scott F. Linde submitted to this Court as Exhibit "A" to a brief in opposition to the Receiver's motion to confirm sale following the May 26, 1989 bidding, which Affidavit was filed with this Court on June 29, 1989.

II. STATEMENT OF FACTS

1. By Order dated March 26, 1985, this Court (a) in Paragraph 8 at page 5 ordered the foreclosure of the properties of Raymond Colliery, Co., Inc. and its subsidiaries ("Raymond Group") by an officer of the Court pursuant to 28 U.S.C. §§2001, 2002, and 2004 and 26 U.S. C. §7403 (d) to satisfy the liens of the creditors of the Raymond Group; and (b) in Paragraph 11 at page 6 retained jurisdiction over all other matters pertaining to the disposition of the lands of the Raymond Group free and clear of liens. (FOF #1.)

2. By Order dated April 30, 1986, this Court, among other things, appointed Thomas H. Kiley as the Receiver of the properties of the Raymond Group with authorization to seek purchasers for said properties but without power to sell those properties except upon application made to this Court. (FOF #2.)

3. Scott F. Linde first had dealings with the Receiver in the spring of 1987, when Linde entered into a lease with the Receiver for land adjacent to the Archbald co-generation plant.
(Linde Affidavit, paragraph 1.)

4. In November of 1987, Linde was the high bidder for the sum of $365,000 on a parcel of the Raymond Group properties located in Wayne County, described in the Raymond Group Prospectus as the Stillwater/Clinton Colliery area.
(Linde Affidavit, paragraph 3.)

5. The Raymond Group Prospectus indicated that Stillwater/Clinton Colliery area 858.8 acres.
(Raymond Group Prospectus, p. 16.)

6. In approximately February or March of 1988, the Receiver informed Linde that the Stillwater/Clinton Colliery area had less acreage than set forth in the Raymond Group Prospectus.

7. During the course of ensuing negotiations concerning the discrepancy in acreage, the Receiver and Linde agreed to include in the sale to Linde an additional 50 acres, known as the "Clinton Culm Bank, " which was contiguous to the Stillwater/Clinton parcel, if Linde agreed to pay the additional appraised value of this parcel, $45,000, increasing the total purchase price from $365,000 to $410,000.
(Linde Affidavit, paragraph 8.)

8. Both parties consented to this agreement, and the parties eventually closed on the sales of the Stillwater/Clinton Colliery area, including the 50 acre parcel known as the Clinton Culm Bank.
(Order 1166, dated May 24, 188; Linde Affidavit, paragraph 9; Warakomski Deposition at 10.)

9. The Clinton Culm Bank was land on which Carrier Coal Enterprises ("Carrier") had an existing leasehold interest to the parcel known as the Clinton Culm Bank. (Linde Affidavit, paragraph 9.)

10. The Clinton Culm Bank was one of 8 parcels that the Receiver had been negotiating to sell to Carrier, the other 7 parcels being:

A. Powderly Bank, located in the Township of Carbondale, Lackawanna County, and approximately 61.93 acres contiguous to the Powderly Bank;

B. Jermyn Bank Area, located in the Borough of Jermyn, Lackawanna County, and approximately 46.30 acres contiguous to the Jermyn Bank;

C. Northwest Bank, also known as Gravity Slope Bank, located in the Borough of Archbald, Lackawanna County, and approximately 3.50 acres contiguous to said Northwest Bank;

D. Eddy Creek, located partially in the Borough of Throop and partially in the Borough of Olyphant, Lackawanna County, and approximately 85 acres contiguous to said Eddy Creek;

E. Grassy Island, located in the Borough of Olyphant, Lackawanna County, and approximately 16.30 acres contiguous to said Grassy Island;

F. Marvine Bank No. 6 located in the City of Scranton, Lackawanna County, and approximately 5.30 acres contiguous to said Marvine Bank No. 6; and

G. Moffat Bank Area, located in the Borough of Taylor, Lackawanna County, and approximatley 29.10 acres contiguous to said Moffat Bank. (N.T. at 17, 31-32; May 20, 1988 Agreement of Sale; Warakomski Desposition at 9, 60-61.)

11. On May 19, 1988, the Receiver called Linde and informed Linde that the Receiver had just had a meeting with a representative of Carrier and he was going to "lose my deal" he was putting together with Carrier if the Clinton Culm Bank was conveyed to Linde. (Linde Affidavit, paragraph 12; Warakomski Desposition)

12. Late in the afternoon of May 19, 1988, Scott Linde ("Linde") met with the Receiver in the Receiver's office to discuss the purchase by Linde of the seven (7) parcels of land identified in paragraph 9, supra, for a purchase price of One Million Four Eighty-three Thousand and 00/100 ($1,483,000.00) Dollars.

13. At the May 19 meeting, Linde was aware that the Receiver and Carrier had been negotiating the sale by the Receiver to Carrier of the seven (7) parcels of land set forth in paragraph 9 hereof plus a parcel known as the Clinton Bank Culm Bank.

14. During the May 19, 1988 meeting, Linde obtained from the Receiver a copy of the Agreement of Sale for the 7 parcels of property identified in Paragraph 9, supra, that had been proposed to Carrier. (Linde Affidavit, paragraph 14; Scott Linde Desposition at 4-7; Warakomski Deposition at 14.)

15. The proposed agreement between the Receiver and Carrier had a provision which prohibited assignment of the agreement without the Receiver's written approval.

16. On May 19, 1988, Linde informed Kiley that it would be necessary for Linde to attract other investors in order to enter into the Agreement of Sale. (Linde Affidavit, paragraph 14; Warakomski Desposition at 17; Scott Linde Despositon at 6-7.)

17. The Receiver recommended that Linde use Allan Kluger as Linde's attorney since Linde's firm was represented by Rosenn, Jenkins & Greenwald, which also respresented Carrier. (Linde Affidavit, paragraph 14.)

18. Later on May 19, 1988, Linde conferred with his brother, Eric Linde, and met with John Delvecchio and several of the Kaminski Brothers for the purpose of determining whether they would be interested in becoming co-investors with Linde in entering into the Agreement of Sale. (Linde Affidavit, paragraph 15; Scott Linde Deposition at 7-8; Eric Linde Deposition at 4.)

19. Eric Linde, the Kaminskis, and Delvecchio agreed to become co-investors and provide part of the required earnest money only on the condition that the Agreement of Sale be assignable. (Linde Affidavit, paragraph 16; Scott Linde Deposition at 8; Eric Linde Deposition at 5.)

20, On May 20, 1988, Linde, accompanied by Terrance Herron of the law firm of Hourigan, Kluger, Spohrer & Quinn, met the Receiver in the Receiver's office. (Linde Affidavit, paragraph 18; Scott Linde Deposition at 13; Herron Deposition at 13; Warakomski Deposition at 20.)

21. At the meeting, Linde again informed the Receiver that he needed co-investors to be able to sign a Agreement of Sale and complete the purchase contemplated thereby.

22. At the meeting, Linde, through counsel, asked the Receiver to modify the proposed Agreement of Sale so that applicable realty transfer taxes would be divided equally between the Seller and Buyer.

23. At the meeting, Linde, through counsel, requested that the paragraph in the original draft of the Agreement of Sale prohibiting assignment without the Receiver's written consent be deleted and the buyer designed as Scott F. Linde or his assigns. (FOF #4.)

24. The Receiver agreed to each of these changes. (FOF #4.)

25. These changes were made in the Receiver's office by the Receiver's Administrative Assistant. (Warakomski Deposition at 22-23).

26. The Receiver did not request any limitation, restriction, qualification or conditon with respect to Linde's right to assign the Agreement of Sale. (N.T. at 37-38; Warakomski Desposition at 21-23.)

27. On May 20, 1988, the Receiver entered into an Agreement of Sale (the "Agreement of Sale") with Scott F. Linde, or his assigns for the 7 parcels of property, along with the coal thereunder, described in paragraph 9, supra, for the sum of $1,483,000. (FOF #3.)

28. Linde did not have any discussions with any representative of Carrier concerning the subject matter of the Agreement of Sale prior to entering into the Agreement of Sale with the Receiver. (Myrtetus Deposition at 21; Eric Linde Deposition at 8.)

29. The Receiver did not inform Carrier that Linde had expressed an interest in purchasing the 7 parcels to which the Agreement of Sale applied and which had been the subject of negotiations between the Receiver and Carrier. (Warakomski Depositon at 61-63.)

30. During the course of the months of June and July, 1988, Linde attempted to put together a group of investors to purchase all the assets of the Raymond Group, including the lands that were the subject of the Agreement of Sale. (Linde Affidavit at 21.)

31. Several weeks after signing the Agreement of Sale, Linde met with George Myrtetus of Carrier for the purpose of determining whether Carrier would be interested in becoming part of a group to purchase all the assets of the Raymond Group. (Linde Affidavit, paragraph 19; Scott Linde Deposition at 20; Myrtetus deposition at 9.)

32. Carrier was not interested in becoming part of the group that Linde was attempting to put together.

33. In mid-July, 1988, Linde, on behalf of a group of investors, submitted to the Receiver an offer of 9.1 million dollars for all the assets of the Raymond Group, including the properties that were the subject of the Agreement of Sale.
(Linde Affidavit, paragraph 21; Scott Linde Deposition at 21.)

34. The Receiver rejected this proposal.
(Linde Affidavit, paragraph 21; Scott Linde Depositon at 21.)

35. On August 8, 1988, the Receiver presented to this Court a motion to approve the Agreement of Sale to Linde. (FOF #6.)

36. Prior to presenting the motion for authority to sell the land and coal to which the Agreement of Sale applies, the Receiver's counsel contacted counsel for the Raymond Group creditors to obtain their concurrence in the motion. No counsel for any of the Raymond Group creditors objected to the proposed motion or the Agreement of Sale. (McLaughlin Depositon at 17-18; N.T. at 14.)

37. By Order dated August 8, 1988, this Court approved the Agreement of Sale to Scott F. Linde upon the terms and subject to the conditions set forth in the Order, including provisions that the sale was subject to publication requirements, to the acceptance of higher bids, and to final confirmation by this Court. (FOF #7.)

38. Pursuant to the August 8, 1988 Order, the Receiver advertised the proposed sale to Linde once a week for 3 consecutive weeks in the Scranton Times.

a newspaper of general circulation in Lackawanna County. The advertisement also set forth the terms and conditions for bidding, including the term "PUBLIC NOTICE Is Futher Given that until 10:00 a.m., prevailing Wilkes-Barre time, Friday, September 2, 1988, any person or entity, including the identified purchaser, wishing to do so, may with respect to the proposed Agreement of Sale, present to the Receiver a written bid to purchase the lands described in the Agreement of Sale so long as such bid is not less than 110% of the purchase price of the Agreement of Sale. If no such bid is offered, the Receiver shall seek final confirmation from the United States District Court for the Middle District of Pennsylvania to conduct the sale in accordance with the the Agreement of Sale."

39. The interest of Raymond Colliery Co., Inc. ("Raymond") in the land to which the Agreement of Sale applied is partly a reversionary interest and partly an unencumbered fee interest. The land which is a reversionary interest is that part of the land where Raymond's interest is subject to term leases and term deeds in favor of Carrier. The lands which are not subject to reversionary interests are lands which are contiguous to the lands subject to the reversionary interests. (FOF #9.)

40. Some two (2) to three (3) weeks prior to September 2, 1988, Murray Ufberg, Esq., the attorney for Carrier, telephoned Allan Kluger, Esq., the attorney for Linde, to inquire whether Linde would consider assigning the Agreement of Sale to Carrier and if so, for what consideration.

41. Thereafter, Attorney Ufberg was informaed by Attorney Kluger that Linde would consider assigning his interest under the Agreement of Sale for $200,000 plus a re-conveyance of the tract known as Marvine Bank No. 6. (Ufberg Deposition at 6-7, 14.)

43. Prior to September 2, 1988, Attorney Ufberg's office had prepared a proposed written Assignment, but had not delivered that proposed document to Attorney Kluger or Linde. (Ufberg Deposition at 10-11.)

44. On September 2, 1988, at approximately 9:30 a.m., Scott F. Linde, his brother, Eric Linde, Attorney Kluger and Attorney Herron arrived at the Receiver's office on the 9th floor of the First Eastern Bank Building in Wilkes-Barre. Shortly therafter representatives of Carrier and its counsel, Murray Ufberg, Esq., arrived at the Receiver's office. At the Receiver's office, in addition to the Receiver and his administrative assistant, Barbara Warakomski, were his counsel, Thomas P. Brennan, Esq., and Christine McLaughlin, Esq. (FOF #10; McLaughlin Deposition at 27.)

45. Following their arrival, Linde's counsel engaged indiscussions with Carriers counsel in the corridor outside the Receiver's office. (FOF #11.)

46. Thomas P. Brennan, Esq., counsel for the Receiver was the person conducting the bidding.

47. At approximately 9:45 a.m., in the corridor outside the Receiver's office, Attorney Ufberg informed Attorney Kluger that Carrier was willing to meet the demand of Linde of $200,000 plus re-conveyance of the Marvine No. 6 tranct in exchange for an assignment of Linde's interests under the Agreement of Sale. (Kluger Deposition at 7; Herron Deposition at 17; Scott Linde deposition at 27.)

48. Attorney Ufberg than delivered to Attorney Kluger a proposed written Assignment. (Ufberg Deposition at 10; Kluger Deposition at 7.)

49. Attorney Kluger requested that his associate, Attorney Herron, draft language to effectuate the parties' agreement that, in addition to payment of $200,000,Carrier would re-convey the Marvine No. 6 tract to Linde. (Kluger Deposition at 7; Herron Deposition at 18.)

50. At approximately 9:45a.m., Attorney Ufberg and Attorney Kluger informed the Receiver and his counsel that Linde would be assigning his rights under the Agreenement of Sale to Carrier, as per written assignment agreement dated September 2, 1988. (FOF #11)

51. Mr. Ufberg and Mr. Kluger met with Mr. Brennan to advise him and the Receiver that Linde would be assigning his rights under the Agreement of Sale to Carrier and that Carrier would not be submitting a bid to the Receiver. Counsel for Linde and counsel for Carrier further advised the Receiver that because the purchaser or purchasers in the Agreement of Sale were designated as Scott F. Linde or his assigns and because the Agreement of Sale did not preclude as assignment, the action by Linde and Carrier was lawful and binding on the Receiver.

52. Counsel for the Receiver and counsel for Linde then returned to the corridor outisde the Receiver's office where the assignment was finalized.

53. Shortly thereafter, counsel for Linde and counsel for Carrier advised the Receiver that the assignment had been consummated and that there would be no bidding. (FOF #13)

54. On Friday morning, September 9, 1988, Linde delivered to the Receiver a copy of the Assignment dated September 2, 1988.

55. On or about September 13, 1988, the Receiver, believing that Linde had breached the Agreement of Sale by his assignment of his interest to Carrier,

drew One Hundred Forty-eight thousand Three Hundred and 00/100 ($148,300.00) Dollars under the letter of credit which Linde had provided as security for faithful performance under the Agreement of Sale and such amount is being held by the Receiver pending these proceedings. (FOF #16.)

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-5802

UNITED STATES OF AMERICA

V

TABOR COURT REALTY CORP.; RAYMOND COLLIERY CO., INC.; McCLELLAN REALTY CO., INC.; LACKAWANNA COUNTY; PAGNOTTI ENTERPRISES, INC.; LOREE ASSOCIATES; JAMES J. TEDESCO; HENRY ENTRE; LOUIS PAGNOTTI, II; BLUE COAL COMPANY; GILLEN COAL MINING CO.; CARBONDALE COAL CO.; MOFFAT PREMIUM ANTHRACITE; NORTHWEST MINING, INC.; MAPLE CITY COAL CO.; POWDERLY CORPORATION; CLINTON FUEL SALES, INC.; GREAT AMERICAN COAL CO.; JOSEPH SOLFANELLI, individually and as trustee; GENERAL ELECTRIC CREDIT CORP.; COMM. OF PA, DEPT. OF MINES & MINERAL INDUSTRIES, DEPT. OF ENVIRONMENTAL RESOURCES and DEPT. OF REVENUE; BOROUGH OF OLYPHANT; JOHN J. GILLEN; THOMAS J.GILLEN; ROBERT W. CLEVELAND & SONS. INC.; WILLIAM T. KIRCHOFF; JAY W. CLEVELAND; ROYAL E. CLEVELAND; CITY OF SCRANTON SEWER AUTHORITY; LACKAWANNA RIVER GLENEAGES INVESTMENT CO. INC.; JEDDO HIGHLAND COAL CO.; OLYPHANT PREMIUM ANTHRACITE, INC.; OLYPHANT ASSOCIATES; MININDU CORPORATION; GLEN NAN, INC.; GILCO, INC.; JAY W. CLEVELAND, AS Administrator of the Estate of Royal E. Cleveland

CARRIER COAL ENTERPRISES ('Carrier)
Appellantt

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil NO. 80-1424)

PRESENT: Becker, Nygaard and Higginbotham, Circuit Judges

JUDGEMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel March 6, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the cause is remanded to the said District Court with instruction to vacate its January 24, 1989 order and with the recommendation that the said District Court consolidate this case (Civil Action 80-1424) with Civil Action 90-1731 and render final decision on the case as a whole. All of the above in accordance with the opinion of this Court.

ATTEST:
Sally Morrow
Clerk

Dated: September 5, 1991
Certified as a true copy and issued in lieu
of a formal mandate on November 4, 1991.

Test:

Clerk, U.S. Court of Appeals for the Third Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-5157 and 89-5198

UNITED STATES OF AMERICA

Appellee

vs .

TABOR COURT REALTY

APPEAL OF SCOTT F. LINDE,
PARTY TO AGREEMENT OF SALE

Appellant

Appeal From The Order Entered On January 24, 1989 By The United States District Court For The Middle District Of Pennsylvania In C.A. No. 80-1424

MOTION OF APPELLANT SCOTT F. LINDE FOR A STAY PENDING APPEAL

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Attorneys for Appellant
Scott F. Linde

institute an action for damages against Linde and Carrier . . .or either of them if in the Receiver's opinion the amountreceived by competitive bidding shall be less than $1,683,000plus the fair market value of the Marvine Colliery Tract."

28. Presently pending before the District Court forits approval is the Receiver's proposed notice of a publicauction of the properties in question. Under the proposednotice, closing with the successful bidder is to occur within 60 days of the public sale.

29. Upon information and belief, the Receiver intendsto immediately publish the Public Notice and schedule the publicauction upon receipt of approval of the Pubic Notice from thedistrict court. -

30. If a stay pending appeal is not granted, Linde will be denied his right to meaningful appellate review in that the property in question will be sold at public auction, thereby preventing specific performance of the Agreement of Sale.

31. Linde's appeal is presently scheduled for disposition during the week of June 19, 1989. In view of the fact that a public auction has not yet been scheduled and the Public Notice must be published once a week for three consecutive weeks, a stay would only minimally delay the ultimate sale of the property. Thus, any harm to the Receiver caused by a stay is de minimis.

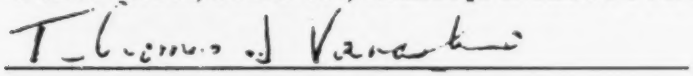
32. This litigation presents substantial legal issues on which Linde is likely to prevail. Specifically, it is

respectfully submitted that Linde had the right to assign his interests under the Agreement of Sale for value. Thus, in the absence of evidence establishing fraud or collusion, there was no legal basis for the district court's action. Furthermore, since the district court had ordered a hearing on the issue of collusion, the district court's ruling, which did not find collusion, denied Linde due process.

33. The public interest weighs decidedly in favor of a stay since a stay will preserve Linde's right to meaningful judicial review and will avoid the litigation that would ensue in the event that the properties in question are sold to a third party during the pendency of this appeal.

WHEREFORE appellant Scott F. Linde respectfully requests that enforcement of the District Court's January 24, 1989 Order be stayed pending disposition of his appeal.

Respectfully submitted,
DILWORTH, PAXSON, KALISH & KAUFFMAN



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Attorneys for Appellant Scott F. Linde

DATED: April 3, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARRIER COAL ENTERPRISES, Plaintiff vs. SCOTT F. LINDE, et al., Defendants	3:CV-90-1731 Notice of Removal Filed September 28, 1990 (Judge Muir)

AFFIDAVIT OF SCOTT F. LINDE

I, Scott F. Linde, swear and affirm that the following constitutes a true and accurate statement of my understanding of the benefit conferred upon me by paragraph 4 of my assignment to Carrier Coal Enterprises dated September 2, 1988.

1. I believed that I had an unabridged right to assign my interests in the Agreement of Sale that I had entered with the Receiver in Bankruptcy, Thomas H. Kiley, on May 20, 1988.

2. I realized that District Court approval of the disposition of any land formerly owned by Raymond Colliery, Inc. was necessary.

3. I recognized that paragraph 4 of the Assignment obligated Carrier Coal Enterprises to obtain the necessary District Court approval.

4. I perceived that, should the District Court withhold approval for any reason, I would yet have the benefit of my Agreement of Sale and would be able to purchase the entire tract in question for a sum certain.

5. I thought it very beneficial that Carrier had obligated itself to obtain district court approval due to my

recognition that there is never certainty in how a court will rule on a given issue.

6. I understood that, in the event Carrier Coal Enterprises did not obtain the necessary District Court approval, I would be able to buy the entire tract in question without the need to participate in a bidding process.

7. It never entered by mind that paragraph 4 of the Assignment was designed to exclusively benefit Carrier Coal Enterprises.

8. When this Court entered its Order of January 24, 1989 I understood that the Assignment to Carrier had become a nullity and agreed with Escrow Agent Allan Kluger to allow the return of the escrow account.

9. I further agreed that Attorney Kluger, who was not functioning as my attorney at that time, should obtain, if possible, Carrier's acknowledgment that the Assignment was extinguished.

10. At all times after January 24, 1989 I was content that the escrow fund be released to Carrier because I did not believe that I had any further claim against that money in light of Carrier's failure to obtain this Court's approval of the Assignment.

11. Based on my personal recollection, the foregoing is an exact recounting of my views as to the meaning and significance of paragraph 4 of the Assignment. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment. This Affidavit is made with full knowledge of and subject to the provisions of 28 U.S.C. §1746 relating to unsworn falsification to authorities.

s/Scott F. Linde
Scott F. Linde

DATED: March 25, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CARRIER COAL ENTERPRISES, Plaintiff vs. SCOTT F. LINDE, et al, Defendants	3:CV-90-1731 Notice of Removal Filed September 28, 1990 (Judge Muir)

DECLARATION OF ALLAN M. KLUGER

I, Allan M. Kluger, Esq., declare and state:

1. I had represented Scott F. Linde in connection with his entering into an Agreement of Sale with the Court-appointed Receiver of Raymond Colliery Co. Inc., which Agreement was dated May 20, 1988. I also represented Mr. Linde in connection with entering into a conditional Assignment dated September 2, 1988, which had been prepared by counsel for Carrier Coal Enterprises.

2. Pursuant to the terms of the Assignment, Murray Ufberg, counsel for Carrier Coal, and I agreed to serve as escrow agents in connection with the escrowing of the cash consideration of $200,000 to be paid under the Assignment.

3. I did not actively participate in the representation of Mr. Linde in connection with the litigation that ensued concerning the Assignment.

4. On March 15, 1989, after this Court had disapproved of the Assignment, I sent to Mr. Ufberg a letter stating that "[i]t would appear to be that in view of the decision of Judge Muir, the

[escrowed] money should be returned to your client." (A copy of the March 15, 1989 letter is attached hereto as Exhibit "A.")

5. By letter dated March 29, 1989, Robert Spielman, Esq. replied to my letter of March 15, 1989, indicating that "Carrier prefers to permit its payment to remain in escrow until the issues raised by Mr. Linde are resolved by the Third Circuit." (A copy of Mr. Spielman's letter of March 29, 1989 is attached hereto as Exhibit "B.")

6. I did not represent Mr. Linde in connection with his assignment of his interest under the May 20, 1988 Agreement of Sale to Lackawanna Land & Energy, Inc., in late April, 1989, nor did I have any knowledge of that assignment.

7. I did not represent Mr. Linde in connection with the judicial sale conducted on May 26, 1989 with respect to the Agreement of Sale in question, at which Carrier was the only party to submit a bid.

8. On May 30, 1989, Attorney Ufberg called me inquiring as to the appropriateness of returning to Carrier the escrowed funds with interest. (A copy of Mr. Ufberg's confirmatory letter of May 30, 1989 is attached hereto as Exhibit "C.")

9. During the course of the first telephone conversation with Mr. Ufberg, he expressed his position that the return of the escrowed funds would not have any effect on the Assignment. I understood Mr. Ufberg's remark to indicate that the return of the money would not prejudice either party's position with respect to whether the Assignment continued to have legal effect.

10. Following my telephone discussion with Mr. Ufberg, I contacted Mr. Linde by telephone. Mr. Linde informed me that, if possible, he would like to obtain a written acknowledgment from Carrier that the Assignment was no longer in effect. I indicated to Mr. Linde that it was highly unlikely that we could obtain the written acknowledgment. Mr. Linde then indicated that if such an acknowledgment could not be obtained I should agree to the return of the escrowed funds. I do not recall whether I discussed with Mr. Linde the remark by Mr. Ufberg that the return of the escrowed funds would not affect the Assignment.

11. I then called Mr. Ufberg, and informed him that the escrowed funds, together with interest, could be returned to his client. I reiterated my understanding that the return of the money would not affect the Assignment.

12. My letter to Thomas I. Vanaskie, Esq., of December 14, 1990, a copy of which is attached hereto as Exhibit "D," was intended to convey that it was my understanding that the return of the escrowed funds would not prejudice either parties' position with respect to the continued validity of the Assignment.

13. I have never represented Lackawanna Land & Energy, Inc.

14. The foregoing is true and correct to the best of my knowledge and recollection, and is made subject to the penalities for prejury.

s/Allan M. Kluger
Allan M. Kluger

DATED: March , 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff vs. GLENEAGLES INVESTMENT COMPANY, INC., et al. and SCOTT F. LINDE; CARRIER COAL ENTERPRISES, Party to Agreement of Sale	CIVIL NO. 80-1424 Reassigned to Judge Muir 3/5/81 (Complaint filed 12/12/80)

FILED
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DONALD R. BERRY
PER
DEPUTY CLERK

NOTICE OF APPEAL

Notice is hereby given that Carrier Coal Enterprises ("Carrier") hereby appeals to the United States Court of Appeals for the Third Circuit from the Order denying Carrier's Motions of June 8, 1990 for the entry of an Order directing the Receiver to convey real estate interests, entered in this action on the 15th day of August, 1990.

Respectfully submitted,

ROSENN, JENKINS & GREENWALD

BY: Francis G. Wenzel

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DATED: September 4, 1990

(2)

No. 91-926

Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

SCOTT F. LINDE,

Petitioner,

vs.

CARRIER COAL ENTERPRISES, INC. and BARBARA WARAKOMSKI, Court-Appointed Receiver for RAYMOND COLLIERY, CO., INC. and Its Subsidiaries,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT CARRIER COAL ENTERPRISES

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APPENDIX

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No. 91-926

In The

Supreme Court of the United States

October Term, 1991

SCOTT F. LINDE,

Petitioner,

vs.

CARRIER COAL ENTERPRISES, INC. and BARBARA WARAKOMSKI, Court-Appointed Receiver for RAYMOND COLLIERY, CO., INC. and Its Subsidiaries,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CARRIER COAL ENTERPRISES

NOW COMES respondent, Carrier Coal Enterprises ("Carrier") , by and through its counsel, Rosenn, Jenkins & Greenwald, and submits this Brief in Opposition to the Petition of Scott F. Linde ("Linde") for a Writ of Certiorari to the United

States Court of Appeals for the Third Circuit seeking review of the Opinion and Judgment of that Court issued on September 5, 1991. Carrier received Linde's Petition on December 5, 1991.

COUNTERSTATEMENT OF THE CASE

On May 20, 1988, Linde entered into an Agreement of Sale with the Receiver of Raymond Colliery Co., Inc. and its subsidiaries (the "Receiver"), by which the Receiver agreed to sell Raymond's interest in some 652 acres of land in Lackawanna County to Linde "or his assigns" for the purchase price of One Million Four Hundred Eighty-Three Thousand Dollars ($1,483,000) (the "Agreement of Sale") (App. 1a). Pursuant to the instructions of the District Court's Order of August 8, 1988, the purchase price contained in the Agreement of Sale was subject to a test through a competitive bidding process at a subsequent judicial sale and to final confirmation of the sale by the District Court. The judicial sale was scheduled for September 2, 1988.

On September 2, 1988, immediately prior to the conclusion of the scheduled time for bids to be received, Linde entered into an assignment with Carrier (the "Assignment") (App. 8a). Pursuant to the terms of the Assignment, Linde agreed to sell to Carrier "all of its right, title and interest in and to" the Agreement of Sale and any amendment thereto (App. 7a). Carrier agreed to pay Linde Two Hundred Thousand Dollars ($200,000), to be held in escrow, and to reconvey a certain tract of the subject property to Linde. After the time to receive any further bids had passed, Linde informed the Receiver of the Assignment to Carrier.

Rather than proceed with the sale pursuant to the Agreement of Sale and the Assignment, the Receiver, on November 12, 1988, filed a motion with the District Court entitled "Motion to Impose Remedies for Unlawful Interference with Court Directed Sale of Real Property" (App. 13a). The Receiver's motion was filed under

the same District Court docket number as the receivership action (80-1424) and Linde and Carrier were named in the motion. The Receiver maintained that Linde had breached the Agreement of Sale by entering into the Assignment with Carrier, that Linde did not have the right under the Agreement of Sale to assign its interests to a party with competitive interest in the subject real estate, and that the Assignment was collusive and an unlawful frustration of the bidding process (App. 13a-22a). Both Linde and Carrier opposed the Receiver's motion (App. 22a).

By Opinion and Order dated January 9, 1989, the District Court held that there was an ambiguity in the meaning of the phrase "Scott F. Linde, or his assigns" in the Agreement of Sale and ordered a hearing on the question of whether Linde and Carrier, by agreeing to the Assignment, had entered into a collusive agreement, which interfered with the competitive bidding process. A hearing was held on January 18, 1989.

By Memorandum dated January 24, 1989, the District Court found that the purpose of bidding was to test the adequacy of the purchase price contained in the Agreement of Sale and to generate higher bidding, and that the Assignment improperly stifled competitive bidding between Carrier and Linde and depressed the price to be paid to the Receiver (App. 40a). The District Court held that it need not decide whether there had been actual collusion between Carrier and Linde. Based upon its findings, the District Court entered an Order which modified the Agreement of Sale language "Linde or his assigns", thereby disapproving the Assignment, continued in full force and effect the Agreement of Sale, and directed the Receiver to reopen the bidding process subject to the same terms and conditions as set forth by its August 8, 1988 Order, so as to again test the adequacy of the purchase price agreed to in the Agreement of Sale.

On February 22, 1989, Linde filed a notice of appeal and

a Motion to Stay the second bid proceeding pending its appeal to the United States Court of Appeals for the Third Circuit (App. 49a, 52a). On March 7, 1989, the District Court denied Linde's request for a stay. Linde filed a notice of appeal from the District Court's March 7, 1989 Order (App. 53a).

Nowhere in his Appellant's Brief, nor in his subsequently filed Reply Brief, did Linde mention that it was his position that the Assignment was no longer valid or that he had made a second assignment to Lackawanna Land and Energy, Inc. ("Lackawanna"). Carrier filed a Brief before the Third Circuit Court of Appeals adopting Linde's position that he had the right under the Agreement of Sale to assign his interest to a competitive bidder.

On July 10, 1989, an oral argument was held before the Third Circuit Court of Appeals (Supp App. 1a).[1] At that time, Linde argued, as he had in his Appellant's Brief, that there was no basis in law or fact for the District Court's determination that the Assignment constituted an impermissible interference with the bidding process and that the District Court erred as a matter of law in holding that Linde's Assignment to a competitive bidder was not authorized by the "or his assigns" language in the Agreement of Sale. At no point during the oral argument did Linde state or imply that he no longer believed the Assignment to be valid, or that he had subsequently entered into an assignment with Lackawanna. Additionally, Linde allotted three (3) minutes of his oral argument time to Carrier, which Carrier used to explain its motives for entering into the Assignment (Supp. App. 9a-11a).

---

1. Not surprisingly, Linde has chosen to omit from his Appendix the transcripts from the oral arguments held before the Third Circuit Court of Appeals on July 10, 1989 and March 6, 1991. Those transcripts are included in Carrier's Supplemental Appendix.

By Opinion and Order dated October 12, 1989, the Third Circuit Court of Appeals reversed the District Court's Order of January 24, 1989 and remanded the case to the District Court for further proceedings (App. 63a). In doing so, the Third Circuit Court of Appeals concluded that, absent collusion in the conduct of the sale, neither inadequacy of the purchase price nor the Assignment from Linde to Carrier was sufficient reason for the District Court "to set aside the assignment or to refuse final court approval of the sale." (App. 65a).

On October 25, 1989, Carrier filed a petition for panel rehearing requesting that the District Court be directed to confirm the sale to Carrier pursuant to the Assignment (App. 79a, 81a). Linde opposed Carrier's motion, arguing for the first time before any court that he believed that the Assignment was no longer valid due to Carrier's failure to file a notice of appeal from the District Court's January 24, 1989 Order, and also finally revealing to the court that he had entered into a subsequent assignment with Lackawanna (App. 87a). On December 21, 1989, the Third Circuit Court of Appeals denied Carrier's request for rehearing without opinion (App. 104a).

A hearing on the issue of collusion was conducted by the District Court in April, 1990. By Opinion and Order dated May 23, 1990, the District Court concluded that the facts presented showed no collusion between Carrier and Linde with respect to the conduct of the sale on September 2, 1988 and that the ruling of the Third Circuit Court of Appeals of October 12, 1989 precluded a finding that the Assignment, in itself, indicated collusive conduct. Accordingly, the District Court ruled that there was no collusion in the conduct of the sale which took place on September 2, 1988 and that the sale to Linde was "confirmed." The District Court directed the Receiver to prepare an "appropriate deed or deeds." (App. 105a).

On June 8, 1990, Carrier, believing that the appropriate deed or deeds would include deeds conveying the property to it pursuant to the Assignment, filed a Motion for Entry of Order Directing Receiver to Convey Real Estate Interests, requesting that the District Court compel specific performance by the Receiver and Linde of their obligations under the Agreement of Sale and the Assignment (App. 123a). Linde filed an Answer to the motion arguing again that Carrier could not compel Linde to honor the promises he made in the Assignment because Carrier had not filed a notice of appeal (App. 126a).

By Order dated August 15, 1990, the District Court denied Carrier's Motion for Entry of an Order Directing Receiver to Convey Real Estate Interests (App. 131a). The District Court's denial of Carrier's motion was not based upon the fact that Carrier did not file a notice of appeal, but instead upon its conclusion that "Carrier's Motion for us to direct the Receiver to convey directly to Carrier is not a proper vehicle for a determination of Carrier's rights, if any, against Linde." (App. 134a). Based upon this reasoning, the District Court denied Carrier's motion "without prejudice to Carrier's right to file an appropriate action against Linde *in the proper Court . . .* " (App. 134a) (emphasis in original). The District Court observed that "Carrier's rights under the Assignment may have been extinguished by our disapproval of the Assignment" and that "Carrier may well have been obliged to appeal from our order if it sought relief from our determination." (App. 133a).

Carrier filed a notice of appeal from the District Court's August 15, 1990 Order (App. 222a). Additionally, in an attempt to follow the District Court's instructions and bring the action in what the District Court obviously viewed as the "proper Court," Carrier promptly instituted in the Court of Common Pleas of Lackawanna County an action seeking specific performance by the Receiver and Linde under the Agreement of Sale and the

Assignment. The Receiver, of course, immediately removed that action to the District Court where it was docketed to Civil No. 3:CV-90-1731.

Carrier has filed a Motion for Summary Judgment in its favor with the District Court in Civil Action No. 90-1731. That motion has been fully briefed and is presently pending before the District Court.

With respect to Carrier's appeal of the District Court's August 15, 1990 Order, Carrier filed an Appellant's Brief and, later, a Reply Brief to the Appellee's Brief submitted by Linde.[2] On March 8, 1991, an oral argument was held before the same panel of the Third Circuit Court of Appeals which had heard the July 10, 1989 argument (Supp. App. 29a).

On September 5, 1991, the Third Circuit Court of Appeals issued an Opinion, holding that the only conclusion that could be drawn from its October 12, 1989 Opinion "is that the assignment to Carrier was still enforceable absent a showing of collusion." (App. 195a) (footnote omitted). Moreover, the Third Circuit Court of Appeals stated that it considered "Linde to have been less than forthright in attempting to deny that, at the time of the original appeal, both parties supported reversal of the District Court's invalidation of the sale because of the assignment." (App. 186a-187a). Based upon these findings, the Third Circuit Court of Appeals concluded that:

> Our reversal as to the district court's [January 24, 1989] order operated to both Linde and Carrier's benefit. Had Carrier filed an appeal, the

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2. Curiously, though he relies heavily upon it in the instant petition, Linde nowhere made mention of *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), in the Brief he submitted to the Third Circuit Court of Appeals.

outcome would not have been different.

(App. 196a-197a). Due to conflicting interpretations of the language of the Assignment itself, however, the Third Circuit Court of Appeals remanded the action to the District Court with instructions to vacate its January 24, 1989 Order, and a recommendation that it "consolidate this case (Civil Action 80-1424) with Civil Action 90-1731 and render final decision on the case as a whole." (App. 197a).

On December 5, 1991, Carrier received Linde's Petition for Writ of Certiorari. This brief is filed in opposition thereto.

REASONS FOR DENYING THE WRIT

I.

LINDE'S PETITION IS REPLETE WITH MISSTATEMENTS AND OMISSIONS OF FACT AND LAW.

Rule 15.1 of the Rules of the Supreme Court provides that, in addition to other arguments for denying the petition, a Respondent's Brief in Opposition "should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Sup. Ct. R. 15.1. The purpose of addressing these misstatements is to avoid a situation in which the Court grants the petition "in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case." *Id.*

Linde's Petition contains numerous misstatements of both fact and law which result in a distortion of the questions which were truly at issue in this case on appeal. Moreover, Linde omits

from his Petition many significant legal and factual matters which affect his request that this Court exercise its discretionary jurisdiction.

Initially, although he includes it in his Appendix, Linde fails to specifically mention that the Third Circuit Court of Appeals issued a Certified Judgment in lieu of a formal mandate to the District Court on November 4, 1991 instructing the District Court to "vacate its January 24, 1989 Order" and recommending that it "consolidate this case (Civil Action 80-1424) with Civil Action 90-1731 and render final decision on the case as a whole." (App. 211a). On November 28, 1991, Carrier filed a motion with the District Court requesting that it follow the recommendation of the Third Circuit Court of Appeals by consolidating the two (2) cases and proceeding to render a final judgment on the case as a whole.

Although Linde has filed the instant Petition, he has made no application to this Court to stay proceedings in the District Court to consolidate and finally adjudicate this matter.[3] Of course, neither the filing of Linde's Petition nor this Court's granting of the Petition, in the absence of a properly requested and

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3. Linde filed a Motion to Stay the Issuance of the Certified Judgment with the Third Circuit Court of Appeals, but was unable or unwilling to post the One Million Six Hundred Thirty-One Thousand Three Hundred Dollar ($1,631,300) bond required by that court as a condition of such a stay. The Certified Judgment issued on the same day that Linde's request for reconsideration of the bond requirement was denied. On December 20, 1991, Linde filed a Motion to Stay with the District Court. Carrier plans to oppose this Motion arguing, *inter alia*, that the District Court is without jurisdiction to stay proceedings since the Third Circuit Court of Appeals has already issued its Certified Judgment. *See* 28 U.S.C. § 2101(f) (providing that stay may be granted only by "a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . ."); *see also, In re Stumes*, 681 F.2d 524, 525 (8th Cir. 1982) (only Court of Appeals or Supreme Court is empowered to stay execution of judgment of Court of Appeals).

adequately secured stay, operates as an impediment to the District Court's ability to act on the judgment of the Third Circuit Court of Appeals by consolidating the cases and rendering a final decision on the matter. *McCurry v. Allen*, 688 F.2d 581, 588 (8th Cir. 1982) (citing Stern and Gross, *Supreme Court Practice*, 847 (5th ed. 1978) for the proposition that neither the filing nor the granting of a petition for certiorari operates as a stay to either the execution of the judgment below or the issuance of the mandate below to a lower court). *See also*, 12 J. Moore, H. Bendix, B. Ringle, *Moore's Federal Practice*, ¶607.05 at p. 9-44, n. 3 (2d ed. 1991). Thus, because Linde has failed to properly request and adequately secure a stay of the District Court proceedings, this Court, in the unlikely event that it grants Linde's Petition, might very well be faced with a case in which the controversy presented to it has, as a practical matter, already been resolved by the District Court.

Linde's Petition also contains numerous statements of fact and law which are not based upon any documents of record or which attempt to create issues where he has previously admitted that no such issues exist. For example, Linde states that "Carrier had been presented with an almost identical draft contract to buy the Raymond Group interests that were the subject of the Linde Agreement of Sale for the same consideration Linde had agreed to pay" but that "Carrier refused to execute the proposed Agreement presented to it." Linde's Petition at 4 and 5 (footnote omitted). While it is undisputed that Carrier had engaged in negotiations with the Receiver to purchase the subject property, there is nothing in the record to substantiate Linde's above-referenced statement.

Even more troubling than Linde's willingness to make such statements without substantiation, is his apparent attempt to revive before this Court facts which he has conceded to the Third Circuit Court of Appeals do not create issues. Linde twice alludes to the

fact that on May 30, 1989 Carrier accepted return of the $200,000 held in escrow pursuant to the Assignment. *See* Linde's Petition at 9 and 16.

Linde fails to mention three (3) significant facts, however, in his repeated attempts to manufacture an issue out of Carrier's acceptance of the return of the $200,000. First, Linde fails to mention that when Carrier initially declined to accept the return of the $200,000, it informed Linde's co-counsel that "[since Linde] has appealed Judge Muir's decision concerning the legal propriety and enforceability of the Assignment Agreement, Carrier prefers to permit its payment to remain in escrow until the issues raised by [Linde] are resolved by the Third Circuit." (App. 161a). Next, Linde fails to mention that when Carrier did accept the return of the $200,000, it did so upon the express understanding of Linde's co-counsel that the return of the money was in no way a waiver of its rights under the Assignment should the District Court's Order of January 24, 1989 be reversed on appeal.[4] Finally, and most importantly, Linde deliberately omits the fact that during the oral argument held on March 6, 1991 before the Third Circuit Court of Appeals, Linde's counsel conceded that the return of the $200,000 was a "non-issue in the case." (Supp. App. 51a). Linde also fails to mention that the Third Circuit Court of Appeals in its September 5, 1991 Opinion, expressly found the return of the $200,000 to be a non-issue (App. 188a, n. 9).

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4. The existence of this express agreement is confirmed by the letter of December 14, 1990 to Thomas I. Vanaskie, Esquire from Allan Kluger, Esquire, both co-counsel for Linde, in which Attorney Kluger states "[m]y recollection is that [Carrier's counsel] contacted me to discuss the return of the $200,000.00 and said his client would accept the $200,000.00, but it was not to effect [sic] the agreement of September 2, 1988 between Carrier and Linde. *I agreed that the $200,000.00 refund would not effect this agreement.*" (App. 163a) (emphasis added). *See also* letters of Carrier's counsel (App. 168a, 171a-173a).

Linde also attempts to create an issue out of the December 21, 1989 summary denial of Carrier's request for rehearing by the Third Circuit Court of Appeals, despite having previously conceded that the ruling was without "precedential significance." (Supp. App. 49a). Indeed, in consecutive sentences of his Petition, Linde accomplishes the incredibly inconsistent feat of stating that "[w]hile the Third Circuit's denial of Carrier's rehearing petition certainly had no precedential import . . .", Linde was nevertheless ". . . plainly justified in believing that the denial of Carrier's rehearing petition meant that if Linde prevailed on the question of collusion, the litigation would be at an end and he would acquire the Raymond Group properties." Linde's Petition at 19. Carrier respectfully submits that it is impossible for any party to be "plainly justified" in believing that a ruling which summarily denies a petition for rehearing and admittedly is without "precedential import" means anything more than that rehearing has been denied.[5]

Linde's Petition makes further omissions and misstatements of fact and law which are tied more directly to his arguments in favor of his request that this Court exercise its discretionary jurisdiction. Accordingly, Carrier will address each of these remaining omissions or misstatements in the arguments in opposition to the granting of a Writ of Certiorari which are set forth below.

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5. Additionally, it must be noted that during the March 6, 1991 oral argument, the Third Circuit Court of Appeals gave a clear indication that the reasons behind its summary denial of Carrier's request for rehearing had more to do with the premature nature of the issue of whether Carrier was entitled to relief than with any argument for invalidity of the Assignment advanced by Linde (Supp. App. 48a-49a).

II.

LINDE'S PETITION UTTERLY FAILS TO DEMONSTRATE ANY SPECIAL AND IMPORTANT REASONS WHICH SUPPORT HIS REQUEST THAT THIS COURT EXERCISE ITS DISCRETIONARY JURISDICTION AND REVIEW THE OPINION AND JUDGMENT OF THE THIRD CIRCUIT COURT OF APPEALS.

Rule 10 of the Rules of the Supreme Court provides that one of the factors to be considered by this Court in determining whether the "special and important reasons" necessary to grant a Writ of Certiorari are present is whether the case presents a situation in which "[a] United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . " Sup. Ct. R. 10(a). In his Petition, Linde attempts, through misconstruction of the holding and rationale of the Third Circuit Court of Appeals, to create the appearance that its September 5, 1991 Opinion is in conflict with decisions of this Court and decisions of various courts of appeals. Moreover, Linde deliberately fails to recognize the factual and legal circumstances of the instant case, many of which were clearly delineated by the Third Circuit Court of Appeals, which render this case distinguishable from each of the decisions which he cites.

A. Linde's Statement of Questions Presented for Review Fails to Recognize the Rationale Underlying the Opinion of the Third Circuit Court of Appeals and States Issues Which Are Not Properly Before this Court for Review.

Linde's misconstruction of the September 5, 1991 Opinion of the Third Circuit Court of Appeals is initially revealed in his "Statement of Questions Presented for Review." Linde's first

question is posited in such a way as to leave the impression that the controlling issue in the instant case is one of which parties were before the court on the original appeal. *See* Linde's Petition at i. What Linde's question clearly ignores, of course, is that the instant case does not turn upon the question of which *parties* were before the court on appeal, pursuant to Rule 4 of the Federal Rules of Appellate Procedure, but instead upon the question of which *issues* were lawfully brought before the court for review pursuant to 28 U.S.C. § 2106. Though he has striven mightily to do so, Linde cannot get around the fact that no matter which party appealed the District Court's Order of January 24, 1989, the Third Circuit Court of Appeals could not reverse that Order without also reversing the District Court's "disapproval" of the Assignment. As the Third Circuit Court of Appeals stated in its September 5, 1991 Opinion:

> . . . [I]t was not unreasonable for Carrier to assume that it was impossible for Linde to appeal *only* the invalidation of the Agreement of Sale without reaching the question of the assignment — the issue of whether the district court had a valid reason for disapproving the Assignment was always present.

(App. 187a) (emphasis in original).

In light of this fact, it is clear that the first question presented by Linde to this Court states an issue that simply does not exist in this case. Regardless of whether Carrier filed a notice of appeal, the Third Circuit Court of Appeals could not reverse the Order of the District Court without also reversing the District Court's "disapproval" of the Assignment, and could not instruct the District Court to "confirm the sale" to Linde without approval

of the Assignment being included therein.[6]

The issue on the original appeal was whether the September 2, 1988 bidding process had been improperly stifled by the Assignment. Accordingly, the Third Circuit Court of Appeals had only two options upon review: (1) affirm the District Court's Order and subject the Agreement of Sale to another bidding process; or (2) remand the action to the District Court with instructions that, unless it found collusion between Linde and Carrier, it must confirm the Agreement of Sale as it stood at the conclusion of the September 2, 1988 bidding process — *i.e.*, with the Assignment. Thus, the instruction to the District Court to "confirm the sale to Linde" necessarily had to include approval of the Assignment. Instructing the District Court to direct the Receiver to convey the property to Linde alone was never an option for the Third Circuit Court of Appeals and was not a form of relief to which Linde was entitled under any scenario.

The second question posited by Linde also fails to recognize this fact. *See* Linde's Petition at i. It is, of course, erroneous to state that "the appellate court did not grant relief to [Carrier]" or that it "directed relief in favor of [Linde] alone," since, as explained above, and as stated in the Opinion of the Third Circuit Court of Appeals, "the only conclusion to be drawn from our [October 12, 1989] opinion is that the assignment to Carrier was still enforceable absent a showing of collusion." (App. 195a) (footnote omitted). Additionally, Linde, in stating his second question, once again attempts to attach some precedential

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6. Indeed, as the Third Circuit Court of Appeals stated:

> In the absence of collusion, the only conclusion that the District Court could reach was that the Agreement of Sale, *with its assignment provision*, was valid. (App. 195a, n. 11) (emphasis in original).

significance to the summary denial of Carrier's request for rehearing by the Third Circuit Court of Appeals, despite the fact that he has conceded that it has "no precedential import." Linde's Petition at 19.[7]

B. The Opinion of the Third Circuit Court of Appeals Is Not in Conflict with any Decision of this Court or of the Other Circuit Courts of Appeals.

Linde contends that the Opinion of the Third Circuit Court of Appeals is in "conflict with the decisions of this Court" and represents a "conflict among the courts of appeals." Linde's Petition at 12. Linde then cites three decisions of this Court, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); and *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937), as well as some later decisions of various Circuit Courts of Appeals, some of which have chosen to interpret this Court's holding in *Torres* broadly. *See* Linde's Petition at 12-25. What Linde fails — or perhaps refuses — to acknowledge, however, is that the instant case is legally and factually distinguishable from each of the decisions upon which he relies.

Initially, it must be reiterated that this case presents a question of whether an issue affecting all parties was properly before the court pursuant to § 2106, and whether the court could grant relief to Linde without addressing that issue. Thus, the question of whether Carrier filed a notice of appeal under Rule 4(a)(3) is irrelevant to the outcome of this matter and is clearly not a question which merits this Court's review.

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7. Linde's constant attempts to revisit issues which he has previously conceded have no bearing on this case — *e.g.*, the denial of rehearing, the return of the $200,000 — are not only a waste of this Court's valuable time, but are also a clear indication that he recognizes the weaknesses in his Rule 4(a)(3) argument and is desperately seeking a fall-back position.

By its Order of January 24, 1989, the District Court "disapproved" the Assignment and directed that the Agreement of Sale be subject to rebidding (App. 48a). Linde appealed, arguing in his Brief that he "plainly had the right to assign his interests under the Agreement of Sale" and that by entering into the Assignment he "merely exercised his right of assignment as provided for in the Agreement of Sale." At oral argument, Linde argued that the decision of the District Court deprived him of "the benefit of a freely negotiated assignment with Carrier Coal." (Supp. App. 4a).

On October 12, 1989, the Third Circuit Court of Appeals reversed the Order of the District Court, stating:

> We conclude that unless there was collusion, fraud, unfairness or mistake in the conduct of sale, . . . neither inadequacy of the purchase price nor the assignment is sufficient reason for the district court to *set aside the assignment* or to refuse final court approval of the sale.

(App. 65a) (emphasis added). The Third Circuit Court of Appeals remanded the action with instructions that the District Court should "either enter an order confirming the sale from the Receiver to [Linde] or alternatively . . . conduct a further hearing to determine if there was collusion in the conduct of the sale." (App. 73a).

On May 23, 1990, the District Court issued an Opinion in which it concluded that "[t]here was no collusion between Carrier and Linde in the conduct of the sale which took place on September 2, 1988." (App. 122a). This conclusion, when coupled with the Opinion of the Third Circuit Court of Appeals of October 12, 1989, necessarily decided that the Assignment was a valid exercise of Linde's power under the Agreement of Sale. The validity of

the Assignment having thus been determined, Carrier immediately took steps to enforce its rights under the Assignment.

Linde disingenuously argues that "the Third Circuit [Court of Appeals] has used Carrier's Appeal of the August 15, 1990 district court ruling to effectively modify the mandate it had issued on Linde's Appeal." Linde's Petition at 19. The Third Circuit Court of Appeals, however, did not "modify" anything in its Opinion of September 5, 1991. Instead, it merely explained to Linde an obvious fact which he has stubbornly refused to recognize since the October 12, 1989 ruling, namely, that the issue of whether the District Court had a valid reason for disapproving the Assignment was always before the court on appeal and that, on remand, the only conclusion the District Court could reach, absent a finding of collusion, was to confirm the sale to Linde and approve the Assignment to Carrier.

Thus, Linde's citations to Rule 4(a)(3) and to cases such as *Morley*, 300 U.S. 185, which prohibit a non-appealing party from "enlarging his own rights thereunder or lessening the rights of his adversary," have no application in the present case. Carrier has not sought to enlarge its own rights or lessen the rights of Linde by enforcing the Assignment. Instead, Carrier seeks only to enforce a right that it always had — *i.e.*, to enforce the Assignment once it had been determined as a matter of law that Linde's entering into the Assignment was a valid exercise of his power under the Agreement of Sale.

Accordingly, the argument that Carrier somehow lost its right to enforce the Assignment because it filed no notice of appeal is without merit. As the Third Circuit Court of Appeals noted:

> Our [October 12, 1989] reversal as to the district court's [January 24, 1989] order operated to both Linde and Carrier's benefit. Had Carrier

> filed an appeal the outcome would not have been different.

(App. 196a-197a). Indeed, apparently even Linde recognizes that the Third Circuit Court of Appeals' analysis on the original appeal "would not have differed one iota" whether Carrier was present in the appeal or not. Linde's Petition at 29 n. 7.

The presence or absence of a notice of appeal by Carrier is, therefore, not an issue which has any bearing on the outcome of this case or which merits review by this Court. The issue of the validity of the Assignment had to be decided by the Third Circuit Court of Appeals regardless of whether Carrier was a party to the original appeal.

It also must be noted that neither *Torres*, nor any other decision of this Court cited by Linde in his Petition, deals specifically with the requirements of Rule 4(a)(3), much less makes the filing of a notice of appeal thereunder a jurisdictional prerequisite. In *Torres*, this Court was presented only with the question of "whether a federal appellate court has jurisdiction over a party who was not specified in the notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c)." 487 U.S. at 313. Torres had been one of sixteen separate plaintiffs who had intervened in an employment discrimination suit. A notice of appeal from an order adverse to all sixteen separate plaintiffs was filed with the United States Court of Appeals for the Ninth Circuit. Torres' name, however, was omitted from the notice of appeal. On remand, the district court entered summary judgment against Torres based upon the fact that he failed to appeal. The Ninth Circuit Court of Appeals affirmed. *Id.* at 313-14.

In upholding the decision of the Ninth Circuit Court of Appeals, this Court held that "[t]he specificity requirement of Rule 3(c) is met only by some designation that gives fair notice

of the specific individual or entity seeking to appeal" and that meeting this requirement was a "jurisdictional prerequisite" to obtaining relief. *Id.* at 318. In language not necessary to its decision, the Court noted that a court "may not waive the jurisdictional requirements of Rules 3 and 4, . . ." *Id.* at 317.

Nowhere in *Torres*, however, does this Court indicate that the filing of a notice of appeal under 4(a)(3) is one of the "jurisdictional requirements" of Rule 4. Indeed, as the Third Circuit Court of Appeals concluded: "the Court's reference to the jurisdictional aspects of Rules 3 and 4 does not indicate that Rule 4(a)(3) is not properly applied as a rule of practice." (App. 193a). Later in its Opinion, in recognition of the fact that certain cases present situations in which the rights of the parties are so inextricably bound together that an appellate court can render no judgment that would be just without affecting the rights of parties who did not file notices of appeal, the Third Circuit Court of Appeals concluded that "the *Torres* holding is not readily transferable to the question of whether or not Rule 4(a)(3) is jurisdictional or a rule of practice." (App. 194a).

In the instant case, the Third Circuit Court of Appeals correctly recognized that "the presence or lack of a formal crossappeal will not always determine a court's ability to consider certain issues that are raised by parties to the appeal but also pertain to parties who are not formally participating in the appeal." (App. 193a). Indeed, Circuit Courts both before and since *Torres* have recognized that, in appropriate circumstances, the general rule that a cross-appeal must be filed in order for a party to obtain relief must yield when applying it would produce unnecessary complications or ambiguity or where the rights of the non-appealing party are so inextricably intertwined with those of the appealing party that it is impossible to grant relief to one party without granting relief to the other. *See e.g., Department of Defense, Office of Dependents Schools v. F.L.R.A.*, 879 F.2d

1220, 1224 n * (4th Cir. 1989) (recognizing that in appropriate circumstances the appellate court clearly has the power under § 2106 to grant relief favorable to non-party in the interests of justice); *Finkielstain v. Seidel,* 857 F.2d 893, 895 (2nd Cir. 1988) (recognizing that requirement of a cross-appeal is a rule of practice which is not jurisdictional and in appropriate circumstances may be disregarded); *see also, Scott University of Delaware,* 601 F.2d 76, 82-84 (3d Cir. 1979), *cert. denied,* 444 U.S. 931 (1979).

The Third Circuit Court of Appeals clearly found the existence of circumstances which made the filing of a cross-appeal by Carrier unnecessary when it concluded that:

> The case at hand presents just such a case where the disposition as to one party is inextricably intertwined with the interests of a non-appealing party so as to make it impossible to grant relief to one party without granting relief to the other . . . . [T]he relief we granted to Linde (the reinstatement of the sale) was premised on the fact that the assignment to Carrier was an improper basis upon which to void the sale . . . .

(App. 194a). There is nothing in *Torres* which indicates that the Third Circuit Court of Appeals acted beyond the scope of its jurisdiction in considering the validity of the Assignment on Linde's appeal. Indeed, if it were not able to consider the District Court's disapproval of the Assignment, it would not have been able to grant Linde the relief which he requested and the only relief to which he was entitled — *i.e.*, confirmation of the Agreement of Sale as it stood at the close of bidding on September 2, 1988.

To interpret *Torres* as limiting the ability of the courts of appeals to view the filing of a cross-appeal as a rule of practice

in appropriate circumstances such as those present in this case would result in the courts of appeals' being deprived of the power to fully adjudicate the issues properly before them pursuant to § 2106. Such a result clearly could not have been intended by this Court when it issued *Torres*.

In addition to the fact that *Torres* does not deal specifically with, and in fact never mentions, the filing of a cross-appeal under Rule 4(a)(3), it is also distinguishable from the present case on factual grounds. In *Torres*, the Court was dealing with sixteen *separate* plaintiffs, each with his or her own *separate* claim. In the present case, however, the Court is faced with two parties to one Assignment, the disapproval of which had to be an issue before the court of appeals no matter which party filed a notice of appeal.

This distinction also separates the present case from *Moitie*, 452 U.S. 394, as well as from each of the Circuit Court cases cited by Linde. *Moitie* involved seven parallel but *separate* civil anti-trust actions. *Id.* at 395. The District Court dismissed all seven complaints. Plaintiffs in five of the seven actions appealed. Plaintiffs in two actions, however, chose not to appeal and instead refiled the two actions in state court. The five actions appealed to the Ninth Circuit Court of Appeals were eventually reversed and remanded. The two state actions were removed to the District Court and were dismissed on the basis of *res judicata*. The plaintiffs in the two actions appealed. *Id.* at 395-396.

On appeal, the Ninth Circuit Court of Appeals reversed, concluding that "[b]ecause the instant dismissal rested on a case that has effectively been overruled, justice requires that the dismissal be reversed." *Moitie v. Federated Department Stores, Inc.*, 611 F.2d 1267, 1269-70 (9th Cir. 1980), *rev'd*, 452 U.S. 394 (1981). This Court reviewed the decision of the Ninth Circuit Court of Appeals.

The only question before this Court on review was "whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of *res judicata*." *Moitie*, 452 U.S. at 395. In reversing, this Court stated that it would not allow the two plaintiffs who had not appealed the first decision to be "the windfall beneficiaries of an appellate reversal procured by other *independent parties who have no interest in [their] case . . . .*" *Id.* at 400 (emphasis added).

The above-emphasized language clearly illustrates the distinction between *Moitie* and the present case. In *Moitie* the original appeal was taken by independent parties who had no interest in the outcome of the non-appealing parties' cases. In the present case, however, the original appeal was taken by Linde who, though an independent party, was required to and did argue that the Assignment to Carrier was a valid exercise of his rights under the Agreement of Sale and was wrongfully disapproved by the District Court. Thus, the original appeal in the present case did not involve the rights of parties who had no interest in each other's cases, but instead involved one issue — the validity of the Assignment — which had to be passed upon by the appellate court before it could grant relief to Linde.

Indeed, if any issue is *res judicata* in this case, it is that the Assignment is valid and, provided there is nothing in its own terms which precludes enforcement (a question presently before the District Court), enforceable. This issue is *res judicata* because the Third Circuit Court of Appeals has held that the Assignment may be found to be invalid only if there was collusion between Linde and Carrier, and the District Court has found that no such collusion occurred. Thus, *Moitie* is distinguishable from the present case.

The cases from the Circuit Courts relied upon by Linde are similarly distinguishable from the present case. In each, separate

parties with separate and distinct claims or liabilities failed to file a notice of appeal and were thus precluded from seeking relief after an adverse judgment had been reversed. In *Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376 (6th Cir. 1991), *cert. denied*, ____ U.S. ____, 1991 U.S. LEXIS 6895 (1991), ten separate trust funds brought an action concerning the failure of six different employers to make agreed-upon payments to the funds on behalf of their employees. *Id.* at 377-78. Because only one plaintiff was named in the notice of appeal and only one defendant in the notice of cross appeal, the court, applying *Torres*, held that only the interests of the named parties were before it on appeal. *Id.* at 380. Like *Torres*, however, *Michigan Carpenters* deals with *separate parties* with *separate and distinct claims*. As explained above, such cases simply do not apply to the present case.

Similarly, in *Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991), a case dealing only with Rule 3(c), the plaintiffs were a police union and five members of the police force. *Id.* at 107. In a notice of appeal from adverse judgments of the District Court, Trooper Pontarelli was the only appellant specifically named. *Id.* n. 2. Accordingly, the court applied *Torres* and held that only Pontarelli's interests were before it. *Id.* at 108-109. Once again, *Pontarelli* deals with separate parties with distinct interests and is therefore inapplicable to this case.

In *Piazza v. Aponte Roque*, 909 F.2d 35 (1st Cir. 1990), the court held that four defendants whose names were not contained in the notice of appeal of a fifth defendant could not benefit from the reversal of a punitive damage award which the fifth defendant obtained. The court, applying *Torres*, found that the reversal could not benefit the four other defendants. *Id.* at 38. As with *Pontarelli*, *Piazza* deals with separate parties with distinct liabilities or claims. Moreover, even the *Piazza* court recognized that the fact that a party files no notice of appeal is sometimes not a jurisdictional

bar to relief when it stated that "*[a]bsent circumstances not present here,* the inescapable consequence of failure to appeal a judgment within the time allowed is that the judgment becomes final." *Id.* at 39 (emphasis added).

Stockstill v. Petty Ray Geophysical, 888 F.2d 1493 (5th Cir. 1989) and *Young Radiator Co. v. Celotex Corp.,* 881 F.2d 1408 (7th Cir. 1989) are similarly distinguishable from the present case. *Stockstill* dealt with whether the court of appeals had jurisdiction over the distinct claim of a separate party who had filed no notice of appeal. The court, choosing to read *Torres* broadly, stated in language not necessary to its decision that "[i]t is questionable whether [cases holding that Rule 4(a)(3) can be read, in appropriate circumstances, as a rule of practice] remain good law in light of *Torres,*" but went on to hold that it was unnecessary to decide that issue since the "rule of practice" exception would not be applicable to the case before it. *Id.* at 1496-97.

Young Radiator also involved the distinct claim of a separate party who filed no notice of appeal. In *Young Radiator,* the defendant, Celotex, failed to appeal the dismissal of its Third Party Complaint even though the plaintiff had appealed the dismissal of its complaint against Celotex. The Seventh Circuit Court of Appeals reversed the dismissal of the plaintiff's complaint and Celotex sought to challenge the judgment entered for the Third Party defendants on its complaint. While the court held that, in light of *Torres,* a notice of appeal under 4(a)(3) on the part of Celotex was a jurisdictional prerequisite to granting relief, *id.* at 1415-17, *Young Radiator,* like the other authorities cited by Linde, is nevertheless distinguishable from the present case since it involves separate parties and distinct claims.

As the Third Circuit Court of Appeals recognized, the one decision which is indistinguishable from the instant case is *In re Barnett,* 124 F.2d 1005 (2d Cir. 1942) (App. 198a) (holding that

the reasoning in *Barnett* applies squarely to the instant case). *Barnett*, like the present case, presented a situation in which the rights of the parties are so inextricably intertwined that relief cannot be granted to the appealing party without enuring to the benefit of the non-appealing party.[8]

Linde makes a curious attempt to distinguish *Barnett* by arguing that it would have application here only if "it was the Receiver who sought to restrain enforcement of the Assignment." Linde's Petition at p. 27 n. 6. The Receiver, however, is precisely the party who sought to restrain enforcement of the Assignment in this case, arguing that it was not a valid exercise of Linde's rights under the Agreement of Sale. *See* Motion to Impose Remedies (App. 13a).

Linde further attempts to distinguish *Barnett* by pointing out several actions on his part which he contends should have put Carrier on notice that he no longer considered the Assignment valid. What Linde fails to recognize, however, is that regardless of the subjective states of mind of himself or Carrier with respect to the continuing validity of the Assignment, it was reasonable, and indeed correct, for Carrier to believe that the Third Circuit Court of Appeals could not decide Linde's appeal without deciding whether the District Court had properly "disapproved" the Assignment. Thus, the degree to which Linde may have misled Carrier as to his intentions with respect to the Assignment, while certainly probative of the manner in which Linde has chosen to conduct himself throughout this litigation, is of no moment.

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8. The knot that inextricably binds Linde and Carrier together is, of course, the Assignment. That knot cannot be undone either by the fact that Carrier filed no notice of appeal or by the fact that Linde has unilaterally determined that he will no longer live up to his obligations under the Assignment. Instead, the only force that can undo the knot, collusion between Carrier and Linde, has been specifically found by the District Court to be absent.

While the degree to which Carrier was misled by Linde may be of no moment, the same cannot be said for the way in which Linde misled the Third Circuit Court of Appeals. Nowhere in either of the briefs he submitted on the original appeal did Linde mention that he no longer believed the Assignment to be valid or that he had entered into a second assignment with Lackawanna.

Linde's deceptiveness before the Third Circuit Court of Appeals was not limited to his briefs, however. At the oral argument on July 10, 1989, Linde made no mention of the fact that he considered the Assignment unenforceable nor of the second assignment to Lackawanna. Indeed, Linde argued that he had been "deprived of the benefit of the freely negotiated assignment with Carrier." (Supp. App. 4a). Moreover, Linde ceded three minutes of his oral argument time to Carrier. Linde now offers the convenient explanation that he did so because he believed "that it was to his advantage to have a non-party argue in support of his position." Linde's Petition at 9. Curiously, however, despite being asked four times during the March 6, 1991 argument to explain why he allowed Carrier to argue before the court, Linde's counsel never offered this explanation (Supp. App. 43a-45a).

The view of the Third Circuit Court of Appeals concerning Linde's conduct is perhaps best illustrated in the following excerpt from the oral argument of March 6, 1991:

> THE COURT: [Linde] came up here and gave us the impression, I mean after all, the fly in the ointment allegedly was the assignment to Carrier, left us with the impression that if we found for [him] and there was no collusion, the deal would go through with Carrier, then found a loophole, we will keep it ourself and assign it to somebody else.

(Supp. App. 41a). Later, in its Opinion of September 5, 1991, the Third Circuit Court of Appeals, while refraining from making "a moral judgment on this tactical approach," noted its "incredulity" at Linde's "dramatic change in posture" from the first to the second appeal (App. 192a).

While Linde's tactical shifting of position is ultimately irrelevant, since he cannot escape the fact that the issue of the validity of the Assignment was always before the Third Circuit Court of Appeals, Carrier submits that it is disingenuous for Linde to now complain that he is the "unwitting dupe of Carrier's 'tactics' " or that an injustice has somehow been done to him because he has been unable to obtain relief to which he was never entitled.

Throughout this litigation, Linde has consistently shifted his stance to whichever position, no matter how inconsistent with his previous stance, gave him the best chance of gaining the property and avoiding the consequences of the Assignment which he voluntarily entered into. Such shifting is evident in the arguments he made — and did not make — in his two appearances before the Third Circuit Court of Appeals, as well as in his vain attempts to revive admittedly lifeless issues before this Court. This constant reinventing of his position did not entitle Linde to relief before the Third Circuit Court of Appeals and certainly does not entitle him to a Writ of Certiorari from this Court.

CONCLUSION

For all of the above-stated reasons, Linde's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — TRANSCRIPT OF PROCEEDINGS DATED JULY 10, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-5157, 89-5198

UNITED STATES OF AMERICA

vs.

TABOR COURT REALTY CORP., McCLELLAN REALTY CO., INC., PAGNOTTI ENTERPRISES, INC., LOREE ASSOCIATES, JAMES J. TEDESCO, HENRY VENTRE, LOUIS PAGNOTTI, II, RAYMOND COLLIERY CO., INC., BLUE COAL COMPANY, GILLAN COAL MINING CO., CARBONDALE COAL CO., POWDERLY CORPORATION, CLINTON FUEL SALES, INC., GREAT AMERICAN COAL CO., JOSEPH SOLFANELLI, Individually and as Trustee, GENERAL ELECTRIC CREDIT CORP., COMMONWEALTH OF PA. DEPT. OF MINES & MINERAL INDUSTRIES, et al.

Scott F. Linde, Party to Agreement of Sale
Appellant

[2] Oral Argument held before the THIRD CIRCUIT COURT OF APPEALS, on Monday, July 10, 1989, transcribed from a tape recording at the UNITED STATES DISTRICT COURT, Room 21400, Philadelphia, Pennsylvania 19106 on Friday, July 14, 1989 beginning at approximately 12:00 p.m., before Lisa DelCasale, Registered Professional Reporter and Approved Reporter for the United States District Court

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Appendix A

BEFORE:

HONORABLE EDWARD R. BECKER, Circuit Judge
HONORABLE A. LEON HIGGINBOTHAM, JR., Circuit Judge
HONORABLE RICHARD L. NYGAARD, Circuit Judge

APPEARANCES:

DILWORTH, PAXSON, KALISH & KAUFFMAN
BY: THOMAS I. VANASKIE, ESQUIRE

Counsel for Appellant

ROBERT SPIELMAN, ESQUIRE

Counsel for Carrier Coal Enterprises
a Pennsylvania Limited Partnership
(in support of Appellant)

THOMAS P. BRENNAN

Counsel for Thomas H. Kiley, Receiver
for Raymond Colliery Co., Inc., et al.

[3] MR. VANASKIE: May it please the Court, my name is Tom Vanaskie, and I represent the Appellant, Scott Linde, in this matter. With the Court's permission, I would like to reserve two minutes for rebuttal.

THE COURT: Sure.

THE COURT: Can you bear with us for just a moment.

(Pause.)

THE COURT: We're working out an issue of great fundamental importance. The lunchroom closes at 1:30, but we think we've got it under control.

(Discussion off the record).

THE COURT: Proceed.

MR. VANASKIE: Thank you, Your Honor. In addition, I should note I have ceded three minutes of my time to counsel for Carrier Coal, though an Appellee, has joined in our brief.

We are here before the Court today because we believe there is neither the basis in law nor in fact for the District [4] Court's determination that the assignment by Scott Linde to Carrier Coal for value of his interest under an agreement of sale constituted an impermissible interference with the bidding process to which that agreement of sale was made subject. I think it's important to realize what the District Court did not do or the approach that it did not take in this matter.

First of all, although it scheduled a hearing on the issue of collusion in the bidding process, it expressly declined to reach that issue and did not find that the parties had engaged in collusion.

Additionally, although the parties had briefed extensively the question of whether the assignment violated public policy in terms of its effect on the bidding process, the District Court did not address that issue. Instead, the District Court viewed the matter as being committed — in his words in his decision on our motion to stay, as committed to his sound [5] discretion citing in support

a District of Maryland Court decision. As a result of the District Court's decision, Linde has lost the bargain that he had with the receiver; he has been deprived of the benefit of the freely negotiated assignment with Carrier Coal.

The District Court's order says that if he was not the high bidder at a second sale, the Court would entertain a motion for the fair disposition of his deposit of $150,000 and that the receiver was not precluded from taking additional action against Linde or Carrier to recover any other shortfall the receiver thought occurred as a result of this conduct.

All of those consequences flow not from a determination that there was collusion, not from a determination that there was fraud, not even from a determination that there was a breach of contract.

THE COURT: Only from a determination of a judge fulfilling what he thought to be [6] his obligation under a statute of the United States in a circumstance where the — where Linde or anyone else in his circumstance who only had a conditional approval and who knew that the approval had to be made final by the Court, a judge who thought that he was protecting the creditors who are supposed to be protected in this circumstance, protecting the integrity of the bidding processes against the situation which snaps suddenly out of the picture a potential of not the most obvious bidder.

Why shouldn't we defer to the District Court in that situation?

MR. VANASKIE: The District — one of the interests that the District Court had a legitimate concern with is to obtain the highest amount of money for these properties in question. But

it had to balance against that interest, the expectation interest of Linde as a contractor who had conditional approval of an agreement that said he had a right to [7] assign it. This Court has said that the interest in obtaining the maximum amount available for a sale that is subject to a public auction cannot overcome the interest in finality in those sales. And I'm referring to the Stanley Engineering case.

THE COURT: That's a bankruptcy case.

MR. VANASKIE: It is a bankruptcy case, Your Honor, but it also involves the same principles, I submit. And that is whether or not the interest in obtaining the highest amount of money for a piece of property is sufficient to outweigh this strong policy in favor of finality and regularity in judicial sales.

THE COURT: But what's the need for finality when all you had in the beginning was a conditional approval which had to be — which was subject to the final approval of the Court?

MR. VANASKIE: The interest in finality, Your Honor, is that the conditional sale contemplated a public bidding process; the bidding process was [8] duly noticed; the bidding process went forward, and no party other than the bid submitted by virtue of that written contract came forward with a bid.

And at that point the bidding process was completed, and Linde had a right to expect that his bid would then be accepted unless there was evidence of fraud, unfairness, mistake or grossly inadequate consideration. And that's what Stanley Engineering held. And in that case, 17 and a half percent difference wasn't gross inadequacy.

And in this case to say that the exercise of the right of assignment was such exceptional circumstance as to warrant a refusal to confirm the sale doesn't fit, and it doesn't fit because Linde negotiated for that right to assign.

The testimony of the receiver was that the original agreement of sale prohibited an assignment without the express written consent of the receiver. If the receiver did not want an assignment prior to the bidding deadline, that restriction could have been inserted. It was not inserted. This matter was not approached by Linde behind closed doors in some smoke filled room but with advice of counsel and immediate advice and information given to the receiver. Under these circumstances where the bid made by Linde is $200,000 more than the highest appraisal, we submit there was not gross inadequacy, there was not evidence of fraud or other unconscionable conduct, and the District Court's interest in getting enough money isn't enough because his discretion was limited. And that is a matter that we submit to you, you have plenary review of, and that is to determine what were the bounds of his discretion.

THE COURT: Why was Linde — I mean Linde's obviously a very capable guy. Why was he able enough or clever enough to get in this buyer that the receiver — this was the logical buyer for the receiver. How come Linde was able to put the deal [10] together and the receiver couldn't?

MR. VANASKIE: That's an interesting question, Your Honor, and as things developed, Linde had negotiated and had purchased another parcel of land from the receiver. It was supposed to be 856 acres, but it turned out it was only 610 acres. They then entered into a negotiation process to make up the short fall. At the same time the receiver is negotiating with Carrier on

the deal that's before the Court today and took some of the property that Carrier had a leasehold interest in and gave it — and made it part of the other Linde transaction. At that point Carrier refused to go forward with its negotiations. It had an agreement in writing for $1,483,000, which it refused to go forward with. The receiver contacted Linde and said I'm going to lose my deal with Carrier because of this matter, and Linde's response was what if I take it. And the Carrier's response was that would work. And that's how the matter came [11] about. But when Linde sat down and looked at the agreement that was prepared by the receiver's counsel, he insisted upon the right of assignment, and that right of assignment gave it value. And if it was to be restricted, as the receiver suggests, to bringing in partners, that limitation could have been expressed. I would point out that the receiver has conceded that Linde could have assigned it for value after the bidding deadline.

THE COURT: Regardless.

THE COURT: The receiver got mad because Linde was making a profit by making a deal that he the receiver couldn't make but that Linde was clever enough to make.

MR. VANASKIE: That's exactly what happened, Your Honor. The receiver got mad. He struck a deal that he could not make, a better deal that he could not make. But it's important that it was not in the context of a public bid. It was a privately negotiated arm's length transaction, and the price would have a [12] different value depending upon the circumstances in which it is struck.

A public sale does not necessarily bring the highest price, and in this circumstance, it wasn't a public sale with parties of

equal bargaining position because Carrier had a vested interest in much of this property. It held long term leases with an option to purchase. I admit that Carrier was the logical buyer of the property, but by getting the right to assign it did — and exercising that, he did nothing wrong.

THE COURT: But should a — should a — should we accord as much right or as much expectation of finality in a private sale situation as we do, let's say, in the Stanley situation where you've got — where you've got a bankruptcy sale?

MR. VANASKIE: Yes, Your Honor, because in the private sale what has happened here is that the bid has been put out to the marketplace through a public bidding. No one shows except Carrier, and [13] Carrier, who has a right to protect its interests under the case law, enters into the assignment with Linde. Under those circumstances, yes, Your Honor.

THE COURT: But isn't there less reason to encourage reliance in the case of private sales because they're always subject to Court approval? I mean you're talking about this as though it were like a purely private situation, and ordinary private contracting arrangements, the whole essence of the law of contracts to give purchasers or whoever may be involved the benefit of their bargains, but does that same principle apply when you're dealing with sales subject to the approval of the Court?

MR. VANASKIE: Your Honor, I think the the same principle does apply where the District Court gives initial approval to the agreement and then sets in place, puts in place a mechanism to look and see whether there are other interested parties. And I think it does, Your Honor.

[14] THE COURT: What you're saying is that if Judge Muir wanted to hold a hearing and make a finding, that there was something collusive here, that that's what he should have done, but he didn't do that. And the finding here reeks of a sub silentio. I mean his ultimate conclusion reeks of a sub silentio conclusion, of collusion in the absence of a hearing on the issue and findings.

MR. VANASKIE: That's exactly right, Your Honor, and in the absence of evidence, that would support the sub silentio conclusion.

Thank you.

THE COURT: Thank you.

MR. SPIELMAN: My name is Robert Spielman. Our firm represents Carrier Coal Enterprises which actually is an Appellee, but we're joined in the brief of Scott Linde, the Appellant. I think there are two points that I'd like to make in the brief time that I've got. First of all, insofar as the integrity of the bidding [15] process is concerned, there was substantial difficulties that Carrier

THE COURT: Keep your voice up a little, Counsel.

MR. SPIELMAN: There were substantial difficulties that Carrier faced in this particular situation regarding the rules that were to be followed at the bidding process itself. On the one hand, you have in the transcript of the hearing before Judge Muir the receiver himself describing one process which would involve the submission of qualifying bids prior to 10:00 a.m. On the other hand, you have the receiver's counsel describing an entirely different process. Now, Judge Muir at the time of the hearing

said, well, I'm looking at this advertisement, and it seems to me that this is the process that should be followed. The problem that we face, though, was that first of all, we were not sure, we were uncertain as to what exactly was going to take place at the time that the bids were to be submitted, and second, [16] even under the scenario given by the receiver's counsel, that is, where written bids were to be submitted prior to 10:00 a.m., there remained considerable ground for doubt and confusion. We did not know, for example, whether a third party or whether Linde might walk in at the stroke of 10:00, put down a written bid, and under the rules, have that be the final bid. Carrier wanted an opportunity to meet any competing bid. It was uncertain whether under these unclear rules that could actually be done.

To a large extent, the assignment agreement that was entered into with Linde was an attempt by Carrier to lend some kind of certainty to a process which it clearly did not understand. You had asked previously how did Linde happen to get the agreement of sale executed with the receiver. That's a question that Carrier had at the time. They were involved in negotiations with the receiver; the next thing they knew, unknown to them, the [17] receiver had executed an agreement of sale with Linde. That's the situation in which all of this took place. We were confused, uncertain and concerned as to what exactly was going to take place, and that is why they agreed to enter into the assignment agreement, which the Court-approved agreement of sale in its own words specifically approved. The "or his assigns" was in an agreement that the Court itself had approved. We are aware that any document is ordinarily assignable by its own terms. We assume that the reason "or its assigns" had been inserted there was to lend specific emphasis to that fact. So the assignability of that agreement, as far as we were concerned, had been approved by the court.

THE COURT: Thank you very much.

MR. BRENNAN: If it please the Court, I am Thomas Brennan. I represent Thomas Kiley, the receiver for Raymond Colliery —

[18] THE COURT: How do you answer Mr. — Mr. Spielman, I thought, made some interesting points about the confusion on that fateful morning, which as a — how do you answer that?

MR. BRENNAN: Your Honor, I don't feel there was any confusion, but I will say this —

THE COURT: But you're not a witness, okay? You're here to answer his argument.

MR. BRENNAN: Your Honor, with all due respect, Mr. Spielman is not a witness either, and they called no witnesses whatsoever to talk about this confusion. They had the opportunity to present testimony to the extent they thought it was relevant at the hearing, to call the people from Carrier Coal to say this is why we did not bid, because of confusion, but they didn't. What you've heard today from Mr. Spielman is not in the record, except to the extent that there was my statement before the Court and the publication before the Court, but there is absolutely no [19] testimony from Mr. Linde or any of his representatives or anyone on his behalf or Carrier Coal or anyone on their behalf that that was the reason they didn't bid. I was quite frankly amazed when the brief came in reciting all of this information when it wasn't a part of the record.

In any event, how do I respond to it? I think I respond to

it the same way Judge Muir did at the argument where we had the motion to — where the Court was considering the motion to dismiss. Judge Muir said look at the publication. It's clear. There is no question as to how you present a bid. If you had presented a bid in accordance with this written publication, Mr. Brennan, what would your position be, and I said I wouldn't have any position except to accept that bid, and he said that's correct.

Now, that was in the argument for the motion to dismiss. Subsequently, when the motion to dismiss was denied, they had the opportunity to present their testimony. [20] They presented no testimony whatsoever.

THE COURT: What I'm trying to sort out is why you have to have testimony. It seems to me what the Appellant's arguing is one, we have a contract; the contract provides for assignment.

MR. BRENNAN: That's correct, Your Honor.

THE COURT: And we assign.

MR. BRENNAN: That's correct, Your Honor.

THE COURT: There's no finding of collusion, no finding of fraud. What is the basis for the trial judge to now repudiate that contract? Are judges so wise and omniscient that they can decide whether they like it or not, for any reason?

MR. BRENNAN: Your Honor, the contract was assignable, and I've never denied that. The contract was also subject to Court approval.

THE COURT: Yes, this is what I'm trying to focus on.

[20] MR. BRENNAN: Yes.

THE COURT: Subject to Court approval, you know, what — let me give you a hypothetical. The Court says oh, yes, well, Mr. Vanaskie, that's a good point, but you came into the Court wearing a red tie, and my whole position is unless it's a red and blue true university of Pennsylvania, yea, I'm going to turn that contract down because it's subject to my approval. If a judge did that —

MR. BRENNAN: He would clearly be wrong, Your Honor. I would clearly say it was an abuse of discretion, and —

THE COURT: Okay. Well, what I'm trying to find out from you is that what's the standard for abuse of discretion. Approval doesn't mean that you can just reject it (inaudible) got the right. What standard does Judge Muir have to reach in order to reject it.

MR. BRENNAN: Okay. I think it's ultimately a standard of fairness, Your Honor, if I can follow through on that.

[22] THE COURT: Okay.

MR. BRENNAN: And that is taken from the language of Stanley Engineering, which I recognize as a bankruptcy case, but I too have struggled with that in terms of preparing the case; how do I get the judge to say this is discretion or not discretion. What he said — the contract said yes, it's assignable, assignable, but the contract was also subject to Court approval.

Now, the testimony of the receiver was that it was understood

when the contract was entered into that that Court approval would only be given following a bid process to test the adequacy of the purchase price. That was understood. So the Court — so the receiver with the contract of sale goes to the Court and asks the Court to approve it. The Court does approve it with the understanding that the terms of it will be published and the terms would be subject to a bid process.

Now, what happened is just at the [23] final moment before the bids — the final moment for the closing of the bids, there was an assignment.

THE COURT: Now, now, hold on there. No one was precluded from bidding. I mean if someone else had come in and said oh my gosh, just the piece of land I wanted and I'll throw $3 million on it, then the judge could have turned down this one and accepted the $3 million. There was no preclusion of bidding, is there? Is this —

MR. BRENNAN: No. But, Your Honor, there are no two — this is a very limited type of tract. There are two people that have an interest in this, the very two people we would expect and would rationally conclude to be the bidders. It only takes two bidders for —

THE COURT: Well, why did you approve — why didn't you allow the contract to give to give a right of assignment? I mean, it seems to me that that if what you want to do is that you — you'd have to say "X" [24] Company, you can assign to anyone but "X." I mean if what you're concerned about is, let's say, suppose we've got someone who's going to purchase an automobile agency. And let's assume we're three major concerns and so General Motors — I mean Chrysler is up for

bids. They're in bankruptcy and you're worried about —

MR. BRENNAN: Specific ones.

THE COURT: — specific ones, and then what you do is you say well, you've got it, you can assign it to anyone but for General Motors. Because if General Motors comes in, they're going to have to pay more. And what the receiver — if the receiver is worried about this, the receiver should have said, look, you can assign this to anyone but — what's the name of the company?

MR. BRENNAN: Carrier Coal Enterprises.

THE COURT: Yes.

MR. BRENNAN: We didn't know it was so limited, obviously, Your Honor. We did [25] — as it turned out, they were the two bidders, but there are other Coal operators in the — that could have come in, and we wouldn't have known that. The history as to why "or his assigns" was added and the language prohibiting assignment was deleted is in the record. It was done with the understanding to give Mr. Linde the opportunity to come up with people to help him complete his bid, not to sell the contract. What I'm suggesting is that.

THE COURT: Well, that's what he did. He did come up with people —

MR. BRENNAN: No.

THE COURT: — to help him complete his bid for a $200,000 profit.

MR. BRENNAN: No. He sold the agreement of sale, Judge, and what I'm suggesting is that when you enter into an agreement, a contract, which was what this assignment was, an agreement of sale between two competitive interests, and the result of that is to — as Judge Muir found as a fact, was to frustrate the bid [26] process, which I believe the large body of law is that if agreement serves the purpose of frustrating the bid process, the very bid process which was established to test the — that the receiver was getting the appropriate value, if it frustrates that process, then the Court says the process wouldn't work for what it was intended for.

THE COURT: But that's because it was — I mean what your argument is pregnant with is that there was collusion. I mean you started — when you were answering Judge Higginbotham's question before, you talked about well, the only two logical bidders were taken out of it. What you're in essence saying and what it seems to me Judge Muir may have been saying sub silentio was that it was collusive, and yet he abjured any reliance on collusion, didn't hold a hearing — there is no evidence, there is no fact findings, why shouldn't we send this back, have a hearing and find out whether it was collusive, whether Linde and Carrier made some deal [27] that — that's against public policy or improper for some reason or other?

MR. BRENNAN: Okay. Your Honor, I don't think collusion has to be found. I think that what we have to find is that there was an agreement which frustrated the bid process.

THE COURT: What does that mean, "an agreement that frustrated the bid process"?

THE COURT: Yes.

MR. BRENNAN: I think what it meant —

THE COURT: Is that a new term of art?

MR. BRENNAN: No, it isn't, Your Honor.

THE COURT: No?

MR. BRENNAN: It is cited in the cases. I'm not that clever to come up with it quite that way —

THE COURT: Yes. Well, I thought that it was not a new term of art. Now, you give us — and in all of the cases where they've ever used an agreement to [27] frustrate the bid process, where there's a factual situation close to this one. which is the primary case which we've cited, it's an 1893 Pennsylvania Supreme Court case, which is cited on Page 17 of our brief —

THE COURT: What were the facts in this? How does that case, the Hayes case compare to this?

MR. BRENNAN: Your Honor, it was an agreement, and it was a secret agreement which two parties entered into, not to bid at an auction, with the idea that the one party would get the bid, would get the property and then he would divide it up with the other party. They agreed not to compete against one another.

THE COURT: Now, we don't have any findings here analogous to what was found in Hayes.

MR. BRENNAN: Your Honor, we do have a finding that the Court determined that the agreement aborted the true test of the — [29] aborted the true test of the bidding, and we do

have a finding, and both of these things there I'm going to mention are in the discussion section of Judge Muir's opinion. We do have the finding that the receiver was deprived of the bid from Carrier Coal Enterprises. They were both findings of fact to that effect.

I don't want to be unresponsive to you.

THE COURT: No. Incidentally, you're being responsive and maybe — I'm struggling because this is really sort of a new realm of law, it seems to me, what you're arguing. What — as I read the Hayes case, they have a secret agreement to refrain from bidding in order to prevent competition. It was not an assignment.

MR. BRENNAN: No. That —

THE COURT: Now, what you seem to be suggesting is that as a matter of law, any time you have an assignment that's the equivalent of a stipulation to refrain from bidding, it therefore is illegal. Isn't [30] that the ultimate logic of what you're —

MR. BRENNAN: I think if I could take a step back —

THE COURT: Yes.

MR. BRENNAN: — Hayes is an example of an agreement which had as its primary purpose the stifling of competition. I start off with Williston on contracts.

THE COURT: Well, that's what an assignment is, by definition. An assignment is saying look, you assign it to me and I'll get it now, and I don't have to worry about having to bid or purchase it from someone else.

Appendix A

MR. BRENNAN: Fine, Judge, but why should the receiver, why should the Court approve the sale at the price of $1,483,000 when it was understood all along that we didn't have to sell it for $1,483,000 unless and until there had been a bid process which established the adequacy of that purchase price.

THE COURT: The Carrier was entitled to bid. The Carrier might have bid.

[31] MR. BRENNAN: It's conceivable, Judge,the Carrier might have bid, but with Carrier having obviously the agreement in hand —

THE COURT: Well but they had —.

MR. BRENNAN: — it made the agreement —

THE COURT: They had to give up something for it. They may — they had to give Linde some other land. They might have got it on their own.

THE COURT: This is what is sort of odd about this case. If they had come in and had bid $1,683,000 —

MR. BRENNAN: Yes. They don't know what Linde would have done. And you see that —

THE COURT: And if Linde had done nothing, it would have been okay.

MR. BRENNAN: If Linde had done nothing, Carrier would have been okay. But the problem is what Carrier wanted to do was to make sure that they got it for a set price which was

acceptable to them. Linde [32] saying —

THE COURT: That's the law of assignment. I mean I've been out of the practice of law a long while, but I always thought that's why you take assignments.

MR. BRENNAN: Okay. Your Honor —

THE COURT: You take an assignment because you want all but a fixed position.

MR. BRENNAN: Okay. Your Honor, I'm not arguing the right to assign. What I'm saying is what has been assigned is a contract which is subject to Court approval, and that Court approval was not going to be given — was never to be given unless there was a fair bid process that established that the receiver was given the fair value.

THE COURT: Well, now you — in terms of fair value —

MR. BRENNAN: Yes.

THE COURT: — I don't know why fair value wasn't established by the appraisal, which was $200,000 lower than the bid.

MR. BRENNAN: Well, Your Honor, if [33] that was the reason, we would never have to go through the bid processes that we go through.

THE COURT: Why?

MR. BRENNAN: So we go through — we had —

THE COURT: How do you measure — I understand that point. How do you measure a fair bid process? If the fair bid process is tested solely by the presence or absence of collusion, then we have to send this back because there's no finding of collusion.

MR. BRENNAN: Okay.

THE COURT: Isn't that right?

MR. BRENNAN: Yes. If there has to be a finding of collusion, then I would agree with Your Honor.

THE COURT: Well, now what — as Judge Higginbotham has observed several times this morning, when we write, we write with precedential effect, and people who buy in Pennsylvania — well, anywhere in the Third Circuit under, what is it, 2006 [34] or whatever it is?

MR. BRENNAN: 2001.

THE COURT: 2001 of Title 28 in connection with what's it, judicial sales; is that the correct —

MR. BRENNAN: Yes, Your Honor.

THE COURT: Judicial sales are going to be bound by it. We've got to lay down some standards. What you want us to say is well, maybe you better tell me what you want us to say about what we say to judges and litigants about how you define a fair bid process. Is a fair bid process like the Chancellor's foot, you know, whatever the Judge's instinct (ph.) of justice is.? Does the fair bid process determine — is it a function of a set

number of bidders? Is it a function of — what's it a function of? What do we tell posterity.

MR. BRENNAN: Your Honor, I realize the light is red, but —

THE COURT: Now you've got all the time you want if you can answer this one.

MR. BRENNAN: I'll do my best.

[35] THE COURT: Yes.

MR. BRENNAN: A fair bid process is a process in which there hasn't been any agreement to depress the price to be paid.

THE COURT: But that's collusion, which is not what —

MR. BRENNAN: Well — which is maybe what Judge Muir found without calling it collusion.

THE COURT: Well, if he did, it's got to go back, because collusion was reserved, and he expressly says that he made no finding of collusion. Well, you know, I don't mean to derail you.

MR. BRENNAN: No, no, Judge, I understand you have to do —

THE COURT: Start again as to what your formulation.

MR. BRENNAN: I don't see why I have to say collusion. In in re: Hayes.

THE COURT: You don't have to. What I'm inviting you to do is tell us give us a way to write the the opinion for you.

MR. BRENNAN: In in re: Hayes there [36] was an agreement between two people. The agreement frustrated the bid process and reduced the price to pay. As I told Judge Muir in argument, the fact that it was secret really did matter. That's like saying it's okay to shoot you in the foot as long as I'm telling you you're being shot in the foot. The point is it's not an issue of collusion; it is whether the agreement frustrates the bid process and made the bid process which was to test the value on unfair process. This became an unfair process because two parties didn't stand toe to toe but each made an agreement with their own separate interests at stake, and because that frustrated a bid process, we don't have to approve that sale, but we order a new sale.

THE COURT: What do you think this will do to — in the future to people who want to rely on the judicial sale?

MR. BRENNAN: I think it will do great things if we approved it because I think what it's saying to people is we're [37] no longer going to have agreements outside of the Court, but we're going to have people come in and toe to toe test the true value, which is what the whole process was intended to do. And if it is a fair process and if it's over with, then yes, we'll confirm it.

And I also want to speak to —

THE COURT: Then what we should do then — then the rule that you want us to say is, the rule that you want us to lay down is that fair bidding in connection with the judicial sale cannot be one where there is an assignment to another potential bidder, whether it's collusion or not. Linde and Carrier may be pure as

the driven snow and it may be there avowed — or their intention in pectore to give half of the profits to the United Way of Lackawanna County. Maybe they're going to get into Heaven as a result of this, but what you want us to say is that you want us to construe 2001 to prohibit assignments of a — of an agreement in connection with a [38] judicial sale to a potential bidder. That would be a prophylactic rule, and you would win; isn't that right?

MR. BRENNAN: Well, I wouldn't want you to do that, necessarily.

THE COURT: Why not?

MR. BRENNAN: There are exceptions to the agreement, and it's called the joint venture exception, but in all the cases with the joint venture exception where parties get together to bid —

THE COURT: Except if there's a joint venture.

MR. BRENNAN: Except if there's the joint venture.

THE COURT: So what we would say then we would lay down a precedent that says the Court may disapprove any bid in connection with the judicial sale where — which contains an assignment to a potential competitor unless there's a joint venture. That's a perfectly good rule and you'd win; isn't that right?

THE COURT: You know, the question is [39] whether it makes sense.

MR. BRENNAN: Yes.

THE COURT: I mean, you know, somewhere along the line

it would be helpful if some of the things that we did made sense, and the rule which you are really suggesting will result in people who think they have a possibility of making an assignment conceivably not even making the original bid because you'd have precluded that, and you may very, very well end up in some situations, maybe even in this case where the property would be sold at a lesser figure than what the deal was here.

Now, that is part of the possibility.

THE COURT: Is that correct, or is what would happen is that everybody would be honest? You have a prophylactic rule, a —

MR. BRENNAN: No. We could have ended up losing money.

THE COURT: Yes. Of course.

MR. BRENNAN: But what I — I don't know how else to explain it, and I'm — to [40] the extent that I'm not representing Judge Muir's thought patterns properly, then I —

THE COURT: You have done an excellent job as counsel. What I really see as what you want to win this case is we'll flip a coin and I will say whether it's heads or tails, I will call and I will look at it, and if it goes my way, fine; if it's what I want, fine; if it doesn't, then I can negate it. I mean — and this is almost in the front (inaudible), a judge has unlimited power to call the shots, and what it reminds me of is this line of, you know — from Gilbert and Sullivan, the law is the perfect embodiment of everything that's excellent. It has no kind of fault or flaw and I and my lords embody the law. And that's what it seems to me you're asking. Am I wrong?

MR. BRENNAN: Your Honor, I'm going to disagree.

THE COURT: Okay. Fine, sure, sure.

MR. BRENNAN. And respectfully.

THE COURT: I understand. Well, [41] you've written an excellent brief. The Hayes case hasn't been cited recently, has it?

MR. BRENNAN: No.

THE COURT: Since this century. All right. Thank you very much, Counsel. We appreciate it.

THE COURT: Mr. Vanaskie, what's wrong with that rule which says that a judicial sale shall be disallowed if there's an assignment to a potential bidder?

MR. VANASKIE: I think there's several things wrong with that. Number one, I think it would discourage parties from getting involved —

THE COURT: Why?

MR. VANASKIE: — in the process. There would be no agreement. There would be no agreement for $1,483,000 if Linde did not have the right to assign it. There would have been no agreement with Carrier Coal at that figure.

THE COURT: Because the only people who might be willing to take it would be [42] people who, by definition, would be potential bidders.

MR. VANASKIE: That's exactly right, Your Honor. They would all be, by definition, potential bidders.

THE COURT: Because if they were going to take it and pay for it, there are people who might have been in there in first place.

MR. VANASKIE: And that rule, Your Honor, would not encourage fairness and honesty. It would encourage dishonesty by saying let's all get together and call ourselves joint ventures so we come within this rule. But here's our secret agreement to divvy up later.

THE COURT: If we want to get the best possible sale, we should encourage enterprising people like Linde to come in and bid.

MR. VANASKIE: We should encourage people — we should encourage receivers who enter into contracts, to follow through with their contracts and when they say that [43] they are to be assignable, recognize that assignment includes the possibility of an assignment prior to the bidding deadline. This contract specifically said it inures to the benefit of the assigns of Linde and that the receiver would use his best efforts to obtain approval.

And I would like to point out, there was one discussion about one exception, the joint venture exception, but there's another exception to these agreements that impact on bidding processes, and that is where a party has an interest in the land. And with the Court's indulgence, I would refer to Sections 1468 of Volume 6A Corbin on contracts, which is not cited in any of the briefs, and I apologize for that, but that says one who has an interest —

THE COURT: Judge Higginbotham and I went to Yale, and

we're delighted to hear you cite Corbin. The other side cited Williston, but we won't hold that against him.

[44] THE COURT: It indicated a weakness in their case, though.

(Laughter)

MR. VANASKIE: But if you look at that section, Your Honors, it specifically recognizes that one who has an interest can even agree not to bid. We didn't have an agreement not to bid here. And for those reasons — and my time is up now, but I wanted to say that there was nothing wrong, yet Linde has been branded a wrongdoer for exercising what his contractual rights gave him.

Thank you.

THE COURT: Thank you. We'd like counsel to order a transcript.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS DATED MARCH 6, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 90-5802

UNITED STATES OF AMERICA

vs.

TABOR COURT REALTY CORP.; RAYMOND COLLIERY CO., INC.; McCLELLAN REALTY CO., INC.; LACKAWANNA COUNTY; PAGNOTTI ENTERPRISES, INC.; LOREE ASSOCIATES; JAMES J. TEDESCO; HENRY VENTRE; LOUIS PAGNOTTI, II; BLUE COAL COMPANY; GILLAN COAL MINING CO.; CARBONDALE COAL CO.; MOFFATT PREMIUM ANTHRACITE; NORTHWEST MINING, INC.; MAPLE CITY COAL CO.; POWDERLY CORPORATION; CLINTON FUEL SALES, INC.; GREAT AMERICAN COAL CO.; JOSEPH SOLFANELLI, Individually and as trustee; GENERAL ELECTRIC CREDIT CORP.; COMM. OF PA., DEPT. OF MINES & MINERAL INDUSTRIES, DEPARTMENT OF ENVIRONMENTAL RESOURCES and DEPT. OF REVENUE; BOROUGH OF OLYPHANT; JOHN J. GILLEN; THOMAS J. GILLEN; ROBERT W. CLEVELAND & SONS, INC.; WILLIAM T. KIRCHOFF; JAY W. CLEVELAND; ROYAL E. CLEVELAND; CITY OF SCRANTON SEWER AUTHORITY; LACKAWANNA RIVER GLENEAGLES INVESTMENT CO., INC.; JEDDO HIGHLAND COAL CO.; OLYPHANT PREMIUM ANTRACITE, INC.; OLYPHANT ASSOCIATES; MININOU CORPORATION; GLEN NAN, INC.; GILCO, INC.; JAY W. CLEVELAND, as Administrator of the Estate of ROYAL E. CLEVELAND, CARRIER COAL ENTERPRISES ("Carrier"),

Appellant

Appendix B

Philadelphia, Pennsylvania
March 3, 1991 - ARGUMENT

[2] BEFORE:
HON. EDWARD R. BECKER
HON. RICHARD L. NYGAARD
HON. A. LEON HIGGINBOTHAM, JR.

APPEARANCES:
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Counsel for Appellee Scott F. Linde

[3] THE COURT: Very well , we have Mr. Whelley for the appellant, and Mr. Vanaskie and Mr. Brennan.

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Are you both going to argue?

MR. VANASKIE: No, sir. I only will argue.

THE COURT: Yes. That's what I would have assumed.

Very well, we will hear from you, Mr. Whelley.

MR. WHELLEY: Thank you very much, your Honor.

THE COURT: We have you all over again. It is a coincidence but a felicitous one that you come back before the very same panel that sent you back to the District Court in the first place and ruled on the petition for panel re-hearing.

MR. WHELLEY: Although I was not privileged to argue for Carrier the first time up, your Honor, I was also pleased because of the benefit of this panel's knowledge of what preceded before.

THE COURT: Not only the panel's [4] knowledge but our ability to interpret with authority our prior ruling on the petition for panel re-hearing.

MR. WHELLEY: Yes, your Honor.

If I may, your Honor, start out by reminding the Court of a situation that Abraham Lincoln found himself in the Circuit Court in Illinois, when on a Monday morning, he argued rather strongly for a position in favor of a party that he was representing and prevailed. He found himself later that week before that circuit judge making an argument for the client, the effect of which was exactly the opposite. When the judge confronted him with his

elocution of the previous Monday, Abe Lincoln is reported to have said, your Honor, I'm not sure I was correct on Monday but I'm sure I'm correct here on Wednesday.

I suggest to the Court, that's the position that my friend and colleague, Mr. Vanaskie of Dilworth, Paxson is taking, that their position before this Court, the first time this came up, I think was clear, that they were concerned about the fact that they could not assign the property to Carrier. We believe that [5] was the intent of the decision of the Court in its first decision.

The matter was returned to Judge Muir and we are back on what we believe are two ancillary issues; the ancillary issue, one, whether the failure of Carrier to be a party appellant means that they cannot now seek the enforceability of the assignmment below because they — cannot refute the decision of the District Court in finding that the assignment was null and void.

Secondly, the issue of waiver, which this Court has requested supplemental documentation. On its face, we believe on its face there is no waiver of the assignment right. I think, what is interesting to observe, if we look at the second point first, that in the answer to the complaint filed by Linde to the specific performance action initially filed in the Court of Common Pleas of Lackawanna County and now before Judge Muir on a petition to remove it, they do not raise either the statute of frauds defense or the defense of waiver; it is not attributed in any way to the affirmative defenses or in any of the [6] extended language in the general denials made to the allegations.

I think this is a late founded objection and you see it, because of letters that I have first seen yesterday, when I reviewed the supplemental documents supplied by Mr. Vanaskie, two letters

by his client raising some questions about the effect of the return of the $200,000 but those issues never being communicated either to Mr. Kluger, his counsel or my partner or partners, Mr. Ufberg or Speilman, who were involved in this matter, in the exchange of correspondence earlier.

Your Honors, with respect to the issue of whether we have a right to challenge the assignment below, I think it turns on two issues, one —

THE COURT: Where is the proceeding before Judge Muir up to right now, as we speak?

MR. WHELLEY: There are two proceedings in two separate actions. Right now we are appealing a decision of Judge Muir on — saying essentially our procedure of seeking to compel the enforcement of the assignment by motion [7] was inappropriate.

MR. WHELLEY: The other case is a separate action started in the Court of Common Pleas of Lackawanna County on his admonition you used the wrong procedure and action started for specific performance of the assignment agreement. It was removed because of the jurisdiction of the Court over Mr. Kiley the receiver. And, we felt he was a party for adjudication, had to be included, so that it ended up in Judge Muir's Court; a motion to dismiss was made by the defendants, that was denied by Judge Muir, finding that you had not yet made clear the issue of Barnett, whether or not we could challenge the appeal and was deferring to you.

Secondly, that the assignment, paragraph four could arbuably be solely for the benefit of Carrier, and therefore, no waiver limit.

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THE COURT: You are talking about his opinion of January 10, 1991?

MR. WHELLEY: That is right, your Honor.

THE COURT: I hate to raise the issue of mootness because all of you have spent so much [8] time and energy on this.

MR. WHELLEY: I'm prepared for that, your Honor.

THE COURT: The appeal which is before us, was a question as to whether Judge Muir should give you the relief you requested, exclusive of, prior to the time you filed your suit in Lackawanna County, am I correct?

MR. WHELLEY: I think that's fair although there were simultaneous acts by us, the appeal here and the suit in Lackawanna County. We took both courses, not sure if it was appropriate to appeal his order or follow his admonition.

THE COURT: Fine. Now it seems to me, looking at Judge Muir's opinion of January 10, he says that these pleadings raise the issue and he denies what I presume may have been some motion to dismiss, but as I read his January 10, 1991 pleading, this is the record and that you have Mr. Linde, the receiver and you; there are three major parties, am I correct?

MR. WHELLEY: Yes, your Honor.

THE COURT: It's the same land involved and the same assignment agreement?

[9] MR. WHELLEY: Yes, your Honor.

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THE COURT: Now, why should not this be decided now that we know that in Judge Muir's mind, the proper pleading is before him, and that we look upon your appeal as moot because you were concerned about the fact that the District Court wasn't going to decide it and see what the District Court Judge does?

MR. WHELLEY: I appreciate the concern of the Appellate Court to allow the opportunity for the District Judge to rule. Except on page five of his decision denying the opportunity to dismiss, which is the addendum number to reply brief of the appellant was provided because of subsequent procedural events.

THE COURT: He says we have the authority.

MR. WHELLEY: He goes on to say, however, the Court of Appeals did not do so on appeal and Carrier provides no authority for its argument that the District Court may do so now.

The problem, we have, your Honor, we think the law is very clear, that In Re Barnett controls, that's what you intended in the first [10] appeal. We are now stuck with his concern.

THE COURT: Counsel, I have this underlined in green, so when you get a green underlining, when it is green I know from experience, yes.

MR. WHELLEY: I should have read from the beginning, where your green is which is the sentence before the one I read already for the record, because that is also helpful.

THE COURT: All right. The Court of appeals possesses the authority to grant relief.

MR. WHELLEY: Despite the cross appeal.

THE COURT: Okay.

Now, it seems to me, that the most which we should do in this case, is to say, that the District Court does have the authority to provide to Carrier the relief it seeks, if Carrier has met its appropriate burden of proof.

MR. WHELLEY: On the Barnett issue, your Honor, or on the issues with respect to the motion for specific performance or the complaint for specific performance?

THE COURT: On specific performance.

[11] MR. WHELLEY: Your Honor, I would be happy to have at least that relief, provided this Court made one thing clear, that the fact that Carrier did not cross appeal is not a bar to recovery.

THE COURT: Okay.

MR. WHELLEY: If I may go one step further, your Honor.

I know judicial economy is very important for this Court, although I'm not considering it a waste of time, I'm considering it an opportunity to try to resolve some problems together.

The Court by separate order has requested certain documentation to be presented before it. It appears, although I cannot read the mind of the Court or the Clerk of this Court, I think the purpose is to find out whether there is any factual basis for the late presentment of the waiver position by Linde.

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Based upon that record, which but for the letters that Mr. Linde sent to his counsel, which will be opposed as not having ever been communicated to us, will probably not make it in [12] the record of the trial below, if there is one, because there is pending a motion for summary judgment on the documentations before you, except the two letters from Mr. Linde. My concern is we will be back here.

THE COURT: Isn't that, Mr. Whelley, exactly what should happen? Let me suggest a variation on the theme, instead of dismissing the appeal for mootness, why don't we just stay this appeal, hold on to it, retain jurisdiction of it, until Judge Muir decides what's before him and further provide that any appeal from that Order should go to this panel, and then we have everything there. Talk about spinning wheels.

MR. WHELLEY: If your Honor please, the In Re Barnett problem, if Judge Muir knows you have no concerns about Carrier not cross appealing because the issues were all presented before the Court, and we have the right to challenge or to enforce the assignment below, that would save it coming back again.

If Judge Muir, that has essentially said in his motion to dismiss. I don't known I need direction from the Third Circuit, we at least [13] should give Judge Muir that direction on that issue.

I think you should go one step further.

THE COURT: Why do we have to commit ourselves, we are not handholders for the District Court, what the District Court does, it seems to me, when it is faced with this kind of situation, it posits two alternatives, decide it both ways, make alternate findings or an alternate conclusion of law. And, then it comes

up and we have the whole case.

MR. WHELLEY: Except that we will be up then on the issue that has been fully briefed and argued appropriately before the Court now because the Judge found, as a matter of his Order below, we could not prevail because of the In Re Barnett problem. I use that, of course, because of the precedent of this Court. That that the cross appeal was not taken, but he raises it in a kind of round about way.

THE COURT: He found the condition waived, as it were. He found ultimately that didn't make any difference.

MR. WHELLEY: I don't know he decided [14] that, your Honor, I wished he did.

THE COURT: That's what it seemed like to me.

MR. WHELLEY: If we have an order of the Court to that effect, it would be helpful; he dances around the subject, I'm afraid.

THE COURT: As I understand it, from your position, you don't want Judge Muir to have the horrible burden of trying to figure out what the Court of Appeals was thinking when we can tell him what we are thinking and, therefore, you want us to resolve that issue without getting into the question of specific performance?

MR. WHELLEY: We would ask this Court to decide the whole issue. We believe the record — we are prepared for that. We may have created our own Hobson's choice.

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THE COURT: The only way any rational lawyer could have gone go up to the Court of Appeals and go to the state court.

MR. WHELLEY: Thank you, your Honor.

THE COURT: If you had gone up to the Court of Appeals, the other side could have said you should have gone to the state court. If you [15] went to the state court, they would have said you should have appealed. No lawyer should be in the position of the adversary being able to play the shell and pea game because you put the pea in the wrong place.

MR. WHELLEY: I think, your Honor, what's before the Court right now is the ability then to resolve the entire matter without the need — I think it is an issue for summary judgment, I think based upon the record, this Court could exercise its jurisdiction and decide the issue as a matter of law; all the information is before you, we submit it would support a motion for summary judgment or ultimate verdict in favor of Carrier. There's really no reason, it seems at this stage to go through that process, because we were careful.

You can take jurisdiction, look at the documents provided, they were provided for all parties, it is consistent with the interpretation of the original decision that the assignment be enforced.

THE COURT: I tell you where I think the finding gap may be.

[16] What is the legal significance of the return of the $200,000 plus interest, was that, as a matter of law, a relinquishment of Carrier's rights or was it because of correspondence that had occurred between counsel, not a relinquishment. You are in the

same position as you would have been if you left the $200,000 here.

I think, that's a gap for a fact finder, which may be called fact finding that you are asking us to decide. Why am I wrong on that?

MR. WHELLEY: I think you are right on the analysis except the problem I raised at the outset, they have not raised a defense of waiver, they have not raised a defense of statute of limitations; that we have filed a motion for summary judgment on the record before the Court.

There is no record before the Court on these issues.

And, I submit to you, there will be uncontroverted testimony because notwithstanding the two letters from Mr. Linde to his counsel, those — no representation those were ever provided to the other side, that there was some condition on the condition.

You have my partner, Mr. Ufberg, then saying we will take the money back but Mr. Kluger, we understand, there is no waiver in this case and there is an affidavit of my partner Mr. Ufberg to that effect. At the request of Mr. Vanaskie, Mr. Linde's counsel, Mr. Kluger acting, I don't know which, you have it or not, but he was asked to say, what did you do and mean, when you returned the money? He wrote Mr. Vanaskie and said I meant not to affect the agreement.

Now the problem is —

THE COURT: You want us to thrash that all out?

MR. WHELLEY: No, your Honor, I don't think there is

anything to thrash out.

I think if you look at the documents you will see there was never any intention between the parties for a waiver. Now, we could ask Judge Muir to make a factual finding but since he would be sitting as the trier of fact, there will be a review of his factual findings, subject to this court's standard, and we will be right back here.

We will be back here on three issues, a [18] grant of motion for summary judgment, a denial of motion for summary judgment, and at least on verdict by Judge Muir against Carrier, maybe on a verdict of Judge Muir against Linde.

THE COURT: I take it on the ultimate merits, that it is your position that Linde double crossed you?

MR. WHELLEY: I think that's a fair characterization, yes, your Honor. I'm suggesting that they found a little loophole, something that may be colorable.

THE COURT: They came up here and gave us the impression, I mean after all, the fly in the ointment allegedly was the assignment to Carrier, left us with the impression that if we found for them and there was no collusion, the deal would go through with Carrier, then found a loophole, we will keep it ourself and assign it to somebody else.

MR. WHELLEY: That's our view.

THE COURT: They did more than that. They allowed you to argue before this Court supporting the assignment.

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MR. WHELLEY: Thank you, your Honor, [19] that's correct.

THE COURT: I mean, that, I mean, how were we mislead. I want to tell you I was absolutely shocked when a lawyer allows you, the assignee to argue before us on his time, supporting that argument, and then later for us to be told, sure we let them argue before the Court, arguing for the assignee, so he could get his $200,000. And, now, they say it is no deal, that was shocking to me.

MR. WHELLEY: Thank you very much, your Honor's.

THE COURT: Mr. Vanaskie, before you start, let me say that I share Judge Higginbotham's view, you may have a correct legal position, you may even have a correct moral position, but it sure doesn't appear on what I know about this case up to now.

MR. VANASKIE: I think I should begin with the rationale for permitting Mr. Spielman at the last time this matter was before this Court to argue.

At that time. I was requested to cede time to Mr. Speilman. At that time that we agreed [20] to cede time to Mr. Speilman, our position had been expressed to Carrier repeatedly that we considered the assignment to be no longer binding upon us.

We had made that position clear on March 15 of 1989, when we wrote, requesting that the escrowed funds be released. Significantly, the appeal period had not yet expired even from the January 24 order since there was a 60 day appeal period here.

We argued to this Court in a motion to stay the conducting

of a second judicial sale on April 4; again within which the time an appeal could be taken, that we wanted a stay to protect our rights in the agreement of sale and not the assignment.

We made an assignment to a second party, to Lackawanna Land and Energy of which Mr. Linde is only one, but indeed a principal shareholder, but only one shareholder.

THE COURT: He is president, isn't he?

MR. VANASKIE: He is vice president of that company, sir.

We made that assignment on April 28, [21] Carrier Coal was aware of that. We appeared at judicial sale, conducted on May 26. We read a statement, at which we said the appeal was taken with the intent to protect our interests.

On May 31, we filed an action for specific performance of the agreement of sale, not of the assignment.

The other side attempted to intervene in that action for specific performance.

We objected, on June 26 of —

THE COURT: Taking all of that in the record, why did you let them argue a case before us, when it was your view that they didn't have a valid assignment? Why would you take up our time?

Don't you think when I saw them argue, and to see you almost like brothers, hand in hand, that I assumed that the person who was arguing before us, was not the beneficiary of the assignment? What should I have voted?

What was your motive?

MR. VANASKIE: My motive was as follows: The Order of Judge Muir not only disapproved of the assignment, it subjected Linde and also Carrier to possible action.

[22] THE COURT: Why didn't you argue it before us without asking Carrier to appear?

MR. VANASKIE: I did not ask Carrier to appear.

THE COURT: Why did you let them appear? You were the one and you were the only one who had the authority to make the decision. If someone said I want to argue, you don't have to say — you know, I read Dale Carnegie, and I believe that everyone should be friends.

You go on and take four minutes of my time. You didn't make that kind of decision.

You could have said, no to them. If you said no to them, we would have gotten a different signal, the way in which the excellent opinion was written by judge Nygaard. You didn't do that.

You let them come up and argue.

MR. VANASKIE: Yes, your Honor, obviously I did let them come up and argue. Under the circumstances, I viewed it as the appropriate thing to do.

I did not view it as an indication I was misleading the Court. I don't think the Court's results should have differed, if we were

arguing [23] back to you in July of 1989.

THE COURT: Why would you get them to argue before us, if you felt that they weren't the assignee. They have lots of things to do in Wilkes Barre, they don't have to come down here to argue a case when they are not the assignee.

MR. VANASKIE: I missed the first part of your question. We didn't ask them to appear here to argue. We didn't ask them to submit a brief in support of our position.

THE COURT: You allowed them.

MR. VANASKIE: Yes, sir, you are right.

THE COURT: I don't say every time, when I see an allocation of time, 15 minutes to so and so has three minutes, so and so has 12, I assume that there is an agreement. And, particularly when the person is not an appellant and you allow them.

MR. VANASKIE: Your Honor, even at that time, the fact that Carrier made an argument with respect to the assignment did not mean that they, themselves, would intend to honor the assignment.

You have asked whether Mr. Whelley feels [24] his clients were double crossed. I think it goes the other way. Mr. Whelley's clients tried to hedge their bets. Mr. Whelley's clients would have liked to have had the option of deciding whether or not they are going to comply with the assignment; that way, if they do not appeal and the notice of appeal signals their intent.

THE COURT: Do you think they were that devious and

sophisticated, Mr. Vanaskie?

MR. VANASKIE: I think, sir, that they wanted to hedge their bets. They had an order.

THE COURT: There is nothing that's immoral about hedging their bet.

What they did was they said, look, the sale is going on, and we will take 10 percent more because if we lose in your case we will win here.

If this sale we bid on is not valid because the Court of Appeals reverses, we will have won there.

Now, there's nothing slimy about that.

MR. VANASKIE: Now, when I say hedge their bets, your Honors. they are saying that the condition was a unilateral one, that they could enforce or one that they could waive. They could [25] make a decision, based upon how events came out, whether or not they would continue to abide by the assignment or not.

Linde, in arguing the appeal, did not have the ability to go back and then demand specific performance or would be confronted with the argument, wait a second, we did not secure District Court approval of the assignment. We did not appeal. And, Mr. Whelley has raised the Barnett issue, I think the issue is properly before the Court, but I think the issue before the Court is jurisdictional in nature.

Did the failure to appeal an Order that disapproved the assignment, where the assignment specified as a condition necessary

Court approval preclude Carrier from obtaining any relief?

I would cite to the Court the Supreme Court's decision in Torres versus the Oakland Scavenger Company, a case that is now being recognized as putting the gloss on Barnett.

THE COURT: And, which we have on two or three occasions construed very narrowly. Recently I did in Paoli, in three or four cases. [26] I mean there was a case, I mean this was a case, the notice of appeal incorporated by reference the caption, didn't it?

MR. VANASKIE: The Torres case, your Honor?

THE COURT: No. This case.

MR. VANASKIE: Would have noticed the caption, yes, sir.

But, there's only one appealing party, Scott Linde. The Torres case involved inadvertent failure to designate one of 16 plaintiffs. And, it was deemed to be a jurisdictional defect.

I did understand that it has been applied liberally by this Court, but the issue becomes one of jurisdictional dimension.

THE COURT: We will examine our own jurisdiction.

Mr. Vanaskie you have relied on our Order denying panel rehearing, have you not?

MR. VANASKIE: Yes, sir.

THE COURT: Isn't it a fact, at the time that motion was before us, pregnant as it was with the self same issues that we

have here, because the — as I recall, the new assignment [27] was disclosed, at that point you already made a new assignment, hadn't you, by that time?

MR. VANASKIE: The assignment had been made in April of 1989, sir. The assignment was made before oral argument was conducted by this Court.

THE COURT: I'm talking about the new assignment.

MR. VANASKIE: No, that was the only assignment done, sir. That was done in April of 1989.

THE COURT: In all events, when we set the petition for panel rehearing before us, we had no way of knowing whether Judge Muir would set the whole — would find collusion and set the whole thing aside, isn't that right?

MR. VANASKIE: You certainly did not know he would find collusion.

THE COURT: For all we knew, Judge Muir would find there was collusion based upon a hearing, and fact finding; set the whole thing aside and all of these other issues would be beside the point, isn't that right?

MR. VANASKIE: That is correct. You [28] also had no way of of knowing he would conduct a hearing on collusion, since your remand instructions gave him the option of either confirming the sale to Linde or conducting a hearing on the issue of collusion.

THE COURT: Why should significance be attributed to our ruling, at a time when it remained possible that our ruling would

be mooted?

MR. VANASKIE: I don't think any precedential significance can be given to that ruling.

We cannot know what was the thought process in terms of what motivated the denial.

What we can say, is that we raised the issue that is before the Court now at that time.

THE COURT: Mr. Vanaskie, why shouldn't we simply hold on to this case, wait for Judge Muir to decide it, retain jurisdiction, direct the Clerk that if and when a new appeal is filed, that it should come back to this panel, why isn't that the most sensible way of dealing with this case?

MR. VANASKIE: The answer, your Honor, is that the question of whether or not the failure to appeal precludes them from obtaining relief, I [29] think is the threshold issue that must be resolved, that issue won't change, that issue could promote judicial economy by obviating the need for further proceedings in the District Court.

I do recognize that the District Court could rule there was indeed a condition precedent that was not fulfilled. And, that issue may not have to be addressed either way.

THE COURT: The District Court could hold a hearing, make fact findings and moot that issue. You want to talk about judicial economy, it is entirely possible that if some of these other issues are explored, that would be the end of it, at least it would come back on a different issue.

MR. VANASKIE: It would come back in a different context, but that issue will still be here. That issue is not going to go away depending upon —

THE COURT; But, I think this panel would agree, I don't think we want to stick any of our colleagues with this case, after all of this time, so we would hold on to it.

[30] In other words, you and Mr. Whelley agree that if we would decide that, limited to that issue, and then retain it or send it back or what have you, that then Judge Muir could proceed?

MR. VANASKIE: Yes, sir.

THE COURT: Could Judge Muir proceed in the alternative, you know, anticipating both rulings, and make all nacessary fact findings and legal rulings to enable us to decide the case either way?

MR. VANASKIE: I see no impediment to Judge Muir's proceeding in that fashion.

THE COURT: He could do that?

MR. VANASKIE: I spay we have presented this issue to the Court —

THE COURT: When I was a District Judge, I remember I had a case I didn't know what the Court of Appeals was going to do, I submitted the case, I told the jury, now, I want you to answer questions A, B and C. I know it is inconsistent, but this is a tricky legal issue and the Court of Appeals may think I am wrong. What want you to do, assuming I am wrong, answer questions D, E and F and they did; that was the end. [31] It was

protected either way. That could be done here, couldn't it?

MR. VANASKIE: Yes, sir. I'm not saying it couldn't be done.

THE COURT: We can't make Judge Muir do it, I suppose, if we simply stay it, it is up to him whether to do it.

MR. VANASKIE: Your Honor, I suppose you are right.

I don't see any reason why Judge Muir wouldn't go ahead and decide the summary judgment motion on the issues before him.

I would say that with respect to the return of the $200,000 and any waiver that's asserted there, we did not raise that issue in our answer because it was not asserted as a basis for relief in the complaint.

I think it is an non-issue in the case.

THE COURT: Isn't it true, that even assuming that Carrier should have appealed, should and could have appealed, that there are exceptions to the — it's not jurisdictional, basically precedential and there are exceptions to the — well, there are grounds to excuse cross appeal, isn't that right? Mr. Whelley has cited that.

MR. VANASKIE: There are precedents that have held that it's a rule of practice, as opposed to a jurisdictional rule, I think those precedents are called into question by the analysis set forth in Torres.

If it was a rule of practice, that was not an inadvertent clerical error excused in that case, instead the Supreme Court went to

great lengths to say it was jurisdictional.

THE COURT: Assuming that it is a rule, assuming we understand your position, and we may have to confront it, assuming that it is a rule of practice, why isn't the failure of Carrier to cross appeal excuseable under the circumstances?

MR. VANASKIE: Because the exceptional circumstances, you see where it has been recognized or not present here.

In Barnett, the mother who had not appealed, had every reason to believe that the appeal was taken to protect her interests.

Indeed, the brief was signed by the attorney on behalf of the assignor and the [33] assignee.

In this case, Carrier had no reason to believe that we took the appeal to protect its interests. We did not.

THE COURT: When you had counsel with you.

MR. VANASKIE: We did not act as its surrogate. He sat at counsel table, they filed on their own a brief in support of the appeal which adopted in total our brief.

Throughout our brief, your Honors, we argued that the consequence of disapproval of the assignment did not mean a second judicial sale, instead it meant confirm the sale to Linde.

I understand your Honor's displeasure at the fact that Mr. Speilman got up here, but the point is, we did not mislead them into believing that at any point in time our position was other than as we have expressed it today and as we expressed it to the

Court in October of 1989.

No, sir, I do not believe that I mislead the Court. I do not believe so.

THE COURT: Well, let me tell you, counsel, the next time that you have someone who [34] appears at your table, and who is adopting, who argues for adopting your position, I'm assuming the two of you are in tandem, when they have no right at all to even argue.

MR. VANASKIE: Thank you, your Honor.

Are there any other questions?

Yes, sir.

THE COURT: I have a couple of other questions.

If they had filed an appeal, what difference would it have made?

MR. VANASKIE: The difference it would have made, number one, signalling their intent to abide by the assignment and comply with the conditions imposed upon them to obtain District Court approval of the assignment.

THE COURT: They can file an appeal.

If they had filed an appeal, this Court's decree, I submit to you, would not have been any different because it would have had to remand to Judge Muir to decide whether there was collusion or fraud.

So, the fact that they were not in this appeal, makes no difference because our remand was [35] on the issue as to whether Judge Muir was in error on precluding this assignment without a factual predicate or conclusion of fraud to summarize.

Please explain to me, what would have been the difference, and if they had appealed as a matter of law on the issue of collusion or fraud?

MR. VANASKIE: In terms of the ultimate outcome of the case, I do not believe that their appeal would have had made any difference.

As a practical matter —

THE COURT: All right. Now in Torres, some of these other cases, it does make a difference.

I mean, here we have a case, where even if their appeal had been taken, I can't see where one sentence of Judge Nygaard's superb opinion would have been changed.

Can you tell me what in his opinion, would have been changed if an appeal had been taken?

MR. VANASKIE: I do not believe the analysis would have changed. I do not believe that a sentence would necessarily have to be changed as a result of the fact that they took an [36] appeal.

However, the situation, I submit is not any different than Torres because there you have 16 plaintiffs, one plaintiff doesn't appeal, the other 15 plaintiffs get their complaint reinstated and that plaintiff, the non-appealing plaintiff is out of Court; there

would be no difference in the analysis undertaken by the Court in that instance other than to recognize the failure to appeal an Order that is adverse to you has consequences.

I also would submit to the Court that as a practical matter, there was a difference in the failure to appeal, and that is as follows: That is that Mr. Linde bears the burden and the expense of the appeal. More importantly, he bore some risks in connection with the appeal. The risk of being held accountable for costs if he did not prevail and also the fact that Judge Muir had indicated that the matter was subject to additional litigation against Mr. Linde.

THE COURT: Okay. Would you be satisfied if we said that any costs which were incurred should be shared by the parties, if that is important, if that is some type of equitable [37] argument. I'll ask counsel for the appellant, is he willing to state that he would share that cost, if that is what you are complaining about.

MR. VANASKIE: I'm not complaining at all about that.

THE COURT: Why did you raise it?

MR. VANASKIE: I'm suggesting that there was a practical difference resulting from the failure of them to appeal.

I do not suggest there was any difference in the Court's analysis but you cannot sit by on the sidelines and then be a cheerleader and then hope to recover. I don't believe the rules permit for that.

Are there any other questions?

Appendix B

THE COURT: We have your position, Mr. Vanaskie.

MR. VANASKIE: Thank you.

MR. WHELLEY: I did not reserve any time for rebuttal, your Honors, with the possibility that this Court may consider my argument and decide the whole case on the merits. Would the Court consider leave for us to file as a supplemental appendix the state of the record in [38] the companion specific performance case through the motion for summary judgment and undisputed fact statement?

THE COURT: You would have no objection to that, would you?

MR. VANASKIE: No, sir.

MR. WHELLEY: And, I would I have no objection, if Mr. Vanaskie would like to have added his —

THE COURT: Why don't you do that, file a joint supplemental appendix. I think that would be helpful.

MR. VANASKIE: Thank you very much.

THE COURT: The panel directs counsel to arrange with the Clerk of Court for a transcript of this oral argument.

There are a lot of positions and representations were made which may be useful to us in disposing of it. And, therefore, the Clerk, upon your request will arrange with a Court Reporter to listen to the tape and transcribe your remarks for our use.

Appendix B

We will take a five minute recess.

(Whereupon the hearing was adjourned)

Supreme Court, U.S.
FILED
JAN 31 1992
OFFICE OF THE CLERK

(3)

No. 91-926

In The

Supreme Court of the United States

October Term, 1991

SCOTT F. LINDE,

Petitioner,

vs.

CARRIER COAL ENTERPRISES, INC., and BARABARA WARAKOMSKI, COURT-APPOINTED RECEIVER FOR RAYMOND COLLIERY, CO., INC. AND ITS SUBSIDIARIES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF OF SCOTT F. LINDE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. THE "RULE OF PRACTICE" APPROACH TO NOTICE OF APPEAL REQUIREMENTS DESTROYS THE FINALITY OF DISTRICT COURT JUDGMENTS.

This Certiorari Petition presents an issue of paramount importance to the orderly administration of justice – whether a party adversely affected by a district court ruling is precluded from obtaining appellate court relief when that party fails to take an appeal from the adverse ruling. Respondent Carrier Coal Enterprises ("Carrier") argues and the Third Circuit ruled that an appellate court has the power to order relief in favor of a non-appealing party so long as that party's interests are "inextricably intertwined" with an appellant's interests. The Third Circuit's ruling rests on its finding that the requirements of Rule 4(a)(3) pertaining to cross-notices of appeal express a rule of practice, and not a jurisdictional prerequisite. No decision of this Court warrants this conclusion, and Carrier has not cited a single precedent of this Court that substantiates its claim to be the windfall beneficiary of Scott F. Linde's successful challenge to the district court order of January 24, 1989 (the "January 24th Order").

Indeed, Carrier's argument is in apparent conflict with rulings of this Court recognizing that a party who has failed to perfect an appeal from an adverse district court ruling is bound by that ruling. *See, e.g., Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1978).[1] Justice O'Connor, recently writing for the Court in *Smith*

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[1] It should be noted that two separate panels of the Third Circuit have held that a party's failure to perfect a separate appeal prevents the court from entertaining that party's appeal with respect to a lower court ruling that imposed joint and several liability even though a co-party had appealed that ruling. *See CTC Imports & Exports v. Nigerian Petroleum Corp.*, ___ F.2d ___, 1991 U.S. App. LEXIS 29470 (3rd Cir., filed December 19, 1991); *Landon v. Hunt*, 938 F.2d 450, 452 n.2 (3rd Cir. 1991).

v. Barry, ___ U.S. ___, 60 U.S.L.W. 4065, 4066 (1992), observed that notice of appeal requirements "are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." More than 50 years ago, this Court held that a federal appellate court does not have the power to modify a district court decree for the benefit of an appellee in the absence of a cross-appeal. *See Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937).

Consideration of the merits of this certiorari petition is essential to provide certainty with respect to the consequences of a failure to appeal. Under the "rule of practice" approach adopted by the Third Circuit, the interests of finality in litigation are subverted. Appellees and appellants alike are subject to having an appellate court grant relief in favor of a non-appealing party, *relief that the appellant did not seek*, because the appellate court perceives the interests of the appealing and non-appealing parties to be "inextricably intertwined." Under the Third Circuit approach, the appellant bears the expense and risks of an appeal, while the "interested" co-party merely rides the coattails of a successful appellate challenge.

The jurisdictional approach to notice of appeal requirements, on the other hand, promotes the interests of certainty and finality in litigation. All litigants and the court are provided proper notice that a party to the trial court proceedings is seeking relief from the appellate court by virtue of taking an appeal. Neither the litigants nor the court are left to guess as to whether a party who has failed to appeal hopes to secure relief if an appellant is successful because the failure to appeal renders final as to the non-appealing party the district court decree.

Carrier attempts to obscure the conflict between the jurisdictional and rule of practice approaches by asserting spurious attacks on the completeness and accuracy of Linde's petition. The accusations are not only baseless but also irrelevant. The incontrovertible facts material to the issue before this Court are:

(1) The January 24th Order, *inter alia*, disapproved of the conditional Assignment and was thus adverse to Carrier.

(2) The deadline for Carrier to appeal the adverse ruling was 60 days after the district court's March 7, 1989 denial of Linde's motion for reconsideration.[2]

(3) Carrier did not file a notice of appeal, but instead entered its appearance as an "appellee" in Linde's appeal from the district court's January 24th Order. (See the Entries of Appearance filed on behalf of Carrier in Linde's appeal, copies of which are included in the Supplemental Appendix hereto at 1c-4c.)

These are the only facts material to the question of whether the Third Circuit lacked jurisdiction to order relief in favor of Carrier with respect to the January 24th Order, and these material facts cannot be rationally distinguished from the factual contexts underlying *Torres* and *Morley Construction*. Accordingly, the certiorari petition should be granted to confirm the clear import of *Torres* and *Morley Construction*: any party who seeks to secure relief from an appealable district court order must perfect an appeal to vest the appellate court with jurisdiction to grant the requested relief.

II. THE CONSEQUENCE OF LINDE'S SUCCESSFUL CHALLENGE TO THE DISTRICT COURT'S JANUARY 24TH ORDER WAS NOT REINSTATEMENT OF THE ASSIGNMENT.

Carrier argues that the Third Circuit had the power to relieve Carrier from the January 24th Order because, in considering Linde's appeal, the Third Circuit necessarily considered Linde's challenge to the correctness of the district court's disapproval of the conditional Assignment. The unsound premise of this argument is that Linde's appeal destroyed the finality of the

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[2] See Fed.R.App.P. 4(a)(1) and (4). At page 4 of its Brief in Opposition to Linde's petition, Carrier erroneously asserts that the district court's Order of March 7, 1989 denied Linde's motion for stay pending appeal. The March 7th order denied Linde's Rule 59 motion, and Linde properly filed his notice of appeal of the January 24th Order following the entry of the March 7th Order. (App. 53a.) Linde's motion for a stay was denied by order dated March 29, 1989.

January 24th Order as it applied to Carrier. *Torres* and *Moitie* reject such a premise.

Carrier's argument also ignores the fact that Linde sought specific performance of the Agreement of Sale, not the Assignment. To secure his requested relief, Linde challenged the propriety of conducting a second judicial sale by contending that the district court had abused its discretion in finding that the conditional Assignment had improperly interfered with the first judicial sale. If there was no impropriety with respect to the first judicial sale, then confirmation of Linde's contract was warranted since no party submitted a competing proposal. Carrier's interests in the conditional Assignment were forfeited by its failure to appeal. Thus, the consequence of a finding that the disapproval of the Assignment constituted an abuse of discretion was not reinstatement of the conditional Assignment, but the confirmation of the Agreement of Sale to Linde.

Indeed, the continuing validity of the conditional Assignment was a matter that only Carrier could pursue. Conveniently omitted from Carrier's Brief in Opposition to Linde's Petition is any reference whatsoever to the fact that the Assignment, drafted by counsel for Carrier, expressly provided that both parties would be released from further liability under the Assignment if *Carrier* failed to obtain district court approval of the Assignment. (App. 7a.) Carrier thus not only had the right to appeal the district court disapproval of the conditional Assignment, but also had the obligation to pursue such an appeal if it intended to preserve the Assignment. As Carrier itself recognizes at page 21 of its Brief in Opposition to Linde's Petition, "the only relief to which [Linde] was entitled [was] confirmation of the Agreement of Sale as it stood at the close of bidding on September 2, 1988." *Torres* and *Morley Construction* compel the conclusion that Carrier could return itself to the position it occupied at the close of bidding on September 2, 1988 only by appealing the district court ruling.[3]

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[3] Carrier erroneously claims that "[t]he knot that inextricably binds Linde and Carrier together is . . . the Assignment." (Carrier Brief at p. 26

(Continued on following page)

It is self-evident that Carrier could not seek to enforce the conditional Assignment if neither party had appealed the January 24th Order. The fact that Linde alone appealed could not preserve Carrier's putative rights in the disapproved Assignment. Carrier cannot rationally distinguish cases such as *Torres*, where a party could not benefit from a co-party's successful appellate court pursuit of issues common to all parties. *Torres* does not turn upon the question of whether there are "separate" claims or "inextricably intertwined" interests, but on the bright line fact that a party failed to perfect an appeal.

Thus, Carrier's purported justification for its failure to appeal – an assumption that Linde's appeal necessarily protected its interests – did not vest the appellate court with the authority to grant Carrier relief with respect to the January 24th Order. Moreover, Carrier's assumption was unreasonable in that Linde could have discontinued his appeal after the deadline for Carrier to appeal had expired, thus leaving the January 24th order final as to Carrier.

The January 24th Order did not preclude the receiver from instituting an action against Carrier and/or Linde if the amount received by competitive bidding proved to be less than the amount to be paid for the property under the terms of the Assignment. (App. 47a.) As recognized by the Third Circuit, Carrier sought to "play both sides of the net at the same time" (App. 187a), claiming a right to enforce the assignment if Linde prevailed but currying favor with the Receiver by not seeking to stay the second judicial sale and not directly challenging the district court's Order. Such tactical litigation games should not be rewarded.

(Continued from previous page)

n.8.) Only if the Assignment's express conditions had been satisfied could Linde and Carrier have been bound by it. Since the district court disapproved the Assignment, the "knot" has never been tied.

III. LINDE HAS CONSISTENTLY ARGUED THAT CARRIER FORFEITED ITS RIGHTS UNDER THE ASSIGNMENT BY FAILING TO APPEAL THE JANUARY 24TH ORDER.

Carrier falsely contends that it was not until Linde opposed Carrier's Petition for Panel Rehearing in November of 1989 that Linde argued "for the first time before any court that he believed that the Assignment was no longer valid due to Carrier's failure to file a notice of appeal from the district court's January 24, 1989 Order." (Carrier's Brief in Opposition to the Certiorari Petition at p.5.) Linde's position had been articulated both to Carrier and in court proceedings well before the Third Circuit heard argument on Linde's appeal. Carrier also wrongfully accuses Linde of deliberately misleading Carrier and the Third Circuit with respect to Linde's position concerning the Assignment. (*Id.* at 26-28.)

At no time during the appeal did Linde request that the conditional Assignment be reinstated. In his Motion for Stay Pending Appeal and in his principal Brief filed with the Third Circuit, both of which were served on Carrier well-before Carrier's appeal deadline, Linde made clear that he was requesting specific enforcement of the Agreement of Sale. On April 28, 1989, Linde assigned his interests under the Agreement of Sale to Lackawanna Land & Energy, Inc., an action completely consistent with his position that the Assignment was a nullity. Carrier was aware of the assignment to Lackawanna Land & Energy. At the second judicial sale conducted on May 26, 1989, Linde announced to the Receiver, Carrier, and all other persons present that if he prevailed on his appeal, he and his assign, Lackawanna Land & Energy, Inc., would seek "specific performance of the Agreement of Sale." (App. 61a.)

On May 31, 1989, Linde and Lackawanna Land & Energy brought an action against the Receiver to compel specific performance of the Agreement of Sale. (Supp. App. at 5c-9c.) On June 13, 1989, Carrier petitioned to intervene in the specific performance action, acknowledging that Linde's position was adverse to Carrier's. (Supp. App. 10c-13c) In

their Answer to the Petition to Intervene, Linde and Lackawanna Land & Energy argued that "the assignment to Carrier . . . , by its terms, *became null and void when the district court on January 24, 1989, refused to approve of the assignment and Carrier . . . failed to appeal the district court's decision.*" (Supp. App. 15c; emphasis added.)

Thus, Linde had informed Carrier of his position with respect to the Assignment prior to the Third Circuit entertaining oral argument on Linde's appeal. Furthermore, Linde did not solicit Carrier's involvement in his appeal. Carrier appeared at the oral argument without any encouragement from Linde and with full knowledge that Linde considered the Assignment to be a nullity. The Third Circuit "assumed" that the position of Linde and Carrier with respect to the Assignment were consistent because of *Carrier's* insinuation of itself into Linde's appeal. Carrier is thus responsible for the Third Circuit's erroneous assumption, not Linde.

Linde's position *vis a vis* Carrier's claims under the conditional Assignment was irrelevant to the Third Circuit's disposition of Linde's appeal. If Linde had informed the Third Circuit in direct terms that Carrier's failure to appeal the January 24th Order precluded Carrier from enforcing the Assignment the Third Circuit analysis would not have changed at all.

Linde's position with respect to the conditional Assignment did not become relevant in his appeal from the January 24th Order until Carrier sought to amend the Third Circuit mandate that authorized confirmation of the sale to Linde. As the Third Circuit recognized, Carrier's rehearing petition, was "pregnant . . . with the self-same issues" brought before the Third Circuit on Carrier's appeal from the denial of its motion to direct conveyance of the receivership properties to it. (App. to Carrier's Brief in Opposition to Linde's Petition, 47a.) Because the briefs filed in connection with Carrier's Petition for Panel Rehearing clearly apprised the Third Circuit that Linde and Carrier were pursuing separate agendas, the Third Circuit's summary denial of Carrier's petition is absolutely inconsistent with its later comments that Linde had misled the Panel.

Linde's position has always remained constant – his appeal was for his own account. Moreover, the Third Circuit's erroneous assumption that Linde was appealing so that the conditional Assignment could be enforced was precipitated by Carrier's conduct undertaken with full knowledge of Linde's position. Carrier's disingenuous argument that Linde has shifted his position in this litigation does not provide grounds for denying Linde's petition.

IV. CARRIER HAS WRONGFULLY ACCUSED LINDE'S COUNSEL OF MISSTATEMENTS AND OMISSIONS OF FACT AND LAW.

It is Carrier, and not Linde, that has distorted the factual record underlying Linde's petition. As noted above, Carrier's accusations concern irrelevant matters, but Linde cannot permit Carrier's affronting distortions to go uncorrected.

At page 10 of its Brief, Carrier baldly proclaims that "Linde's Petition . . . contains numerous statements of fact and law which are not based upon any documents of record. . . . " The only fact that Carrier then points to as lacking substantiation is the statement in the petition that Carrier had refused to execute a draft of the receiver's agreement that was almost identical to the draft contract presented to Linde. (Carrier Brief at 10.) Even if there was no substantiation for this factual assertion, the error on Linde's part would have no bearing on the issues before this Court. Significantly, however, Carrier's charge ignores the testimony presented at the hearing conducted by the district court on April 19, 1990. Specifically, Linde testified that the Receiver had caused Linde to believe that Carrier had refused to execute an agreement of sale virtually identical to the draft presented to Linde, and his testimony was corroborated by the testimony of the receiver's administrative assistant, Barbara Warakomski. (Transcript of April 19, 1990 Hearing at 90-93, 273-77, 287; Supp. App. at 18c-28c.)

Carrier further complains of Linde's reference to the undeniable fact that on May 30, 1989, the first business day after the second judicial sale, Carrier requested the return of

the escrowed cash consideration for the conditional Assignment. Linde simply reported these facts because they are part of the case chronology.

Linde is not attempting to create an "issue" with respect to the return of the cash consideration insofar as his petition is concerned. It must be noted, however, that, contrary to Carrier's suggestion, Linde did not concede that the conditional Assignment remained in full force and effect despite the return of the escrowed consideration. While Carrier refers to the letter of Attorney Allan Kluger as evidence that *he* had agreed that the refund of the cash consideration would not affect the Assignment, it has ignored Mr. Kluger's Affidavit in which he explains that his letter "was intended to convey that it was *[his]* understanding that the return of the escrowed funds would not prejudice either parties' position with respect to the continued validity of the Assignment." (App. 219a-221a; emphasis added.) Carrier also ignores Linde's Affidavit in which he states that he "was content that the escrow fund be released to Carrier because [he] did not believe that [he] had any further claim against that money in light of Carrier's failure to obtain [district court] approval of the Assignment." (App. 218a.)

Finally, Carrier contends that Linde has omitted material facts by failing to state that his Motion to Stay the issuance of the Third Circuit mandate pending the filing of his certiorari petition had been denied and that Linde did not request a stay from this Court. The denial of a stay of issuance of the mandate has no precedential significance with respect to the grant of the certiorari petition. Moreover, Linde has taken what he believes to be the appropriate steps by asking the district court to exercise its inherent discretion to stay the proceedings before it pending this Court's decision on the certiorari petition. The district court has already exercised such discretion *sua sponte* by staying proceedings until the outcome of Carrier's appeal to the Third Circuit. Linde's stay motion is still pending before the district court and a conveyance of the property to Carrier is not imminent. If a conveyance becomes imminent, Linde will take the appropriate action in this Court to preserve the status quo.

Furthermore, Carrier's argument ignores the fact that this Court can decide the merits of Linde's petition without further briefing or argument. *See* Rule 16.1 of the Rules of the Supreme Court. Indeed, in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982)(*per curiam*), this Court granted certiorari and summarily reversed the Third Circuit without requiring briefing on the merits where the Third Circuit improvidently accepted jurisdiction over an appeal based upon a notice of appeal filed before the disposition of a Rule 59 motion despite the clear terms of Rule 4(a)(4), which provides that a notice of appeal filed before a decision on a Rule 59 motion shall have no effect. It is respectfully submitted that summary disposition on the merits is appropriate in this case.

CONCLUSION

For these various reasons, the Petition for a Writ of Certiorari of Scott F. Linde should be granted.

Respectfully submitted,

DILWORTH, PAXSON, KALISH & KAUFFMAN

THOMAS I. VANASKIE, ESQ.

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Attorneys for Petitioner
Scott F. Linde

THIS FORM MUST BE COMPLETED IN FULL WHETHER OR NOT YOU INTEND TO ACTIVELY PARTICIPATE

APPEARANCE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

United States of America)
)
)
)
vs.)
)
Tabor Court Realty Corp., et al.)
Scott F. Linde, Party to)
Agreement of Sale,)
Appellant)
)

No. 89-5157

(Filed Mar. 13, 1989)

Enter my appearance for: (XXXXXXX/appellee; XXXXXX-XXXXXXX)

Name of Party Represented Carrier Coal Enterprises, a Pennsylvania Limited Partnership

(sign) /s/ Robert Spielman

Type or Print Name Robert Spielman

Law Firm Rosenn, Jenkins & Greenwald

P. O. Address 15 South Franklin Street

Wilkes-Barre, PA 18711

Social Security No. 188382288

Telephone No. 717-826-5664

U.S. GOV'T F.T.S. TEL. NO., IF APPLICABLE

✓ I intend to actively participate in this case by filing a brief on the merits.
Please enter my appearance on the docket.

_ I intend to adopt or join in the brief of another party.
Please enter my appearance on the docket.

I **do not** intend to actively participate in this case.

_ I understand that my appearance **will not be entered** on the docket and that I will receive no further correspondence from the Court of Appeals.

THIS FORM MUST BE COMPLETED IN FULL WHETHER OR NOT YOU INTEND TO ACTIVELY PARTICIPATE

APPEARANCE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

United States of America)
)
) *No.* 89-5198
)
vs.)
)
Tabor Court Realty Corp., et al.)
Scott F. Linde, Party to)
Agreement of Sale,)
Appellant)

Enter my appearance for: (XXXXXXX/appellee; XXXXXX-XXXXXXX)

Name of Party Represented Carrier Coal Enterprises, a Pennsylvania Limited Partnership

(sign) /s/ Robert Spielman

Type or Print Name Robert Spielman

Law Firm Rosenn, Jenkins & Greenwald

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_____

SCOTT F. LINDE and LACKAWANNA LAND AND ENERGY, INC.	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiffs	:	CIVIL ACTION – EQUITY
vs.	:	
THOMAS H. KILEY, RECEIVER OF RAYMOND COLLIERY CO., INC. AND ITS SUBSIDIARIES	:	NO. ___ of 1989
Defendant	:	

COMPLAINT

1. Plaintiff, Scott F. Linde, is an adult individual residing in the Borough of Honesdale, County of Wayne, Commonwealth of Pennsylvania.

2. Plaintiff, Lackawanna Land and Energy, Inc., is a Pennsylvania Corporation with its principal place of business located in the City of Scranton, County of Lackawanna, Commonwealth of Pennsylvania.

3. Defendant, Thomas H. Kiley, Receiver of Raymond Colliery Co., Inc. and its subsidiaries (hereinafter referred to as "Raymond"), is and at all times mentioned was the duly appointed Receiver of Raymond, the owner of the following described real estate located in the County of Lackawanna, Commonwealth of Pennsylvania, and more particularly described in Exhibit A:

(a) Powderly Bank, located in the Township of Carbondale, Lackawanna County, and approximately 61.93 acres contiguous to said Powderly Bank;

(b) Jermyn Bank area, located in the Borough of Jermyn, Lackawanna County, and approximately 46.30 acres contiguous to said Jermyn Bank;

(c) Northwest Bank, also known as Gravity Slope Bank, located in the Borough of Archbald, Lackawanna County and approximately 3.5 acres contiguous to said Northwest Bank;

(d) Eddy Creek, located partially in the Borough of Throop and partially in the Borough of Olyphant, Lackawanna County and approximately 85 acres contiguous to said Eddy Creek;

(e) Grassy Island, located in the Borough of Olyphant, Lackawanna County, and approximately 16.30 acres contiguous to said Grassy Island;

(f) Marvine Bank #6 located in the City of Scranton, Lackawanna County and approximately 5.30 acres contiguous to said Marvine Bank #6; and

(g) Moffat Bank area, located in the Borough of Taylor, Lackawanna County and approximately 29.10 acres contiguous to said Moffat Bank.

COUNT I

4. Plaintiffs hereby incorporate the averments in paragraphs 1 through 3 as if the same were set forth herein at length.

5. On or about May 20, 1988, the Receiver entered into an Agreement of Sale with Scott F. Linde or his assigns whereby defendant agreed to sell and convey to Linde or his assigns and Linde agreed to purchase from

defendant the real estate described in paragraph 3 above under the terms and conditions of the Agreement of Sale, a copy of which is attached hereto as Exhibit "B."

6. The Agreement of Sale provided, *inter alia*, that the sale was subject to prior approval of the United States District Court for the Middle District of Pennsylvania and the Receiver agreed to "use reasonable best efforts to obtain said Court approval."

7. By Order of the United States District Court for the Middle District of Pennsylvania dated August 8, 1988, the Sale was made subject to public bids to be scheduled pursuant to a legal notice, a copy of which is attached hereto as Exhibit "C."

8. The legal notice indicated that the Receiver would accept bids for the subject property in an amount not less than 110% of the purchase price as set forth in the Agreement of Sale and that if no bids were offered the Receiver would "seek final confirmation from the United States District Court for the Middle District of Pennsylvania to conduct the sale in accordance with the Agreement of Sale."

9. No bids were received by the Receiver pursuant to the Court directed bidding procedure.

10. Plaintiff, Scott F. Linde, has performed all of the covenants and conditions of the Agreement of Sale to be performed on his part.

11. Plaintiff, Scott F. Linde, was, at all times mentioned, and is now ready, willing and able to complete the transaction called for by the Agreement of Sale on his part.

12. On or about November 21, 1988, the Receiver filed a Motion to Impose Remedies for Unlawful Interference with a Court Directed Sale of Real Property in an attempt to defeat the terms of the Agreement of Sale.

13. Defendant has breached his obligations under the Agreement of Sale by refusing to use his best efforts to effectuate the terms of the Agreement of Sale.

14. On or about April 28, 1989, Scott F. Linde assigned all of his right, title and interest in and to the Agreement of Sale to Lackawanna Land and Energy, Inc. A copy of the Assignment is attached hereto as Exhibit "D."

15. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that this Honorable Court:

1. Enter a degree requiring and ordering defendant specifically to perform under the Agreement of Sale according to its terms, conditions and provisions;

2. Enjoin and restrain defendant from transferring, conveying, mortgaging or otherwise disposing of or alienating the subject real estate during the pendency of this suit;

3. Award plaintiffs costs of this suit; and

4. Award plaintiffs such other and further relief as the Court may deem just and proper.

Respectfully submitted,

DILWORTH, PAXSON, KALISH & KAUFFMAN

/s/ Thomas I. Vanaskie
Thomas I. Vanaskie
Elizabeth Schneider

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Scranton, PA 18503
(717) 346-7569

Attorneys for Plaintiffs
Scott F. Linde and
Lackawanna Land
and Energy, Inc.

DATED: May 31, 1989

SCOTT F. LINDE and LACKAWANNA LAND AND ENERGY, INC.	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiffs	:	CIVIL ACTION – EQUITY
vs.	:	
THOMAS H. KILEY, RECEIVER OF RAYMOND COLLIERY CO., INC. AND ITS SUBSIDIARIES	:	NO. 57 of 1989
Defendant	:	

PETITION TO INTERVENE

(Filed June 13, 1989)

COMES NOW, Carrier Coal Enterprises, a Pennsylvania partnership ("Carrier"), by its attorneys, Rosenn, Jenkins and Greenwald, and avers as follows:

1. Carrier is a Pennsylvania partnership whose primary offices are located at 11 East 44th Street, Suite 1700, New York, New York 10017.

2. On or about May 20, 1988, Thomas H. Kiley, Receiver of Raymond Colliery Co., Inc., and its subsidiaries ("Receiver") entered into an agreement of Sale ("Agreement of Sale") with Scott F. Linde ("Linde") or his assigns for the sale of certain real estate interests ("Real Estate Interests").

3. On or about April 28, 1989, Linde attempts to assign all of his right, title, and interest in the agreement of Sale to Lackawanna Land and Energy, Inc. ("Lackawanna").

4. In their Complaint against the Receiver, Linde and Lackawanna request, inter alia, the issuance of a decree requiring the Receiver to perform specifically his obligations under the Agreement of Sale with Linde.

5. However, on September 2, 1988, Linde had *also* assigned all of his interests under the Agreement of Sale to Carrier.

6. The assignment between Linde and Carrier took place over eight months prior to the assignment between Linde and Lackawanna.

7. The assignment between Linde and Carrier was disapproved by the Federal District Court for the Middle District of Pennsylvania ("District Court"), which has jurisdiction over the receivership of Raymond Colliery Co., Inc. and its subsidiaries ("Raymond").

8. The District Court's disapproval of the assignment between Linde and Carrier is the subject of an appeal filed by Linde to the United States Court of Appeals for the Third Circuit ("Third Circuit"), where the matter is now pending.

9. In its order disapproving the assignment between Linde and Carrier ("Order"), the Middle District also directed the Receiver to advertise and conduct a second auction ("Second Auction") of the Real Estate Interests. A copy of the Order is attached as Exhibit "A".

10. Linde requested a stay of the Order, but the stay request was denied by both the District Court and the Third Circuit.

11. A Second Auction for the sale of the Real Estate Interests was held by the Receiver on May 26, 1989.

12. Carrier was the successful bidder for the Real Estate Interests at the Second Auction.

13. Since Linde had assigned his rights under the Agreement of Sale to Carrier eight months prior to the attempted assignment to Lackawanna, since the propriety of the assignment between Linde and Carrier is the subject of an appeal now pending before the Third Circuit, and since Carrier was the successful bidder for the Real Estate Interests at the Second Auction held by the Receiver, following the denial by the Middle District and the Third Circuit of Linde's stay request, it is readily apparent that Carrier's legally enforceable interest in the Real Estate Interests will be adversely affected by the instant complaint of Linde and Lackawanna, wherein Linde and Lackawanna seek the issuance of a decree compelling the Receiver to perform specifically his alleged obligations to sell the Real Estate Interests to Linde and Lackawanna under the Agreement of Sale.

14. If permitted to intervene as a defendant in the instant proceeding, Carrier will remove this matter to the Middle District. Attached to his Petition is a copy of the pleading which Carrier will file.

WHEREFORE, Carrier prays that the Court grant its Petition to intervene as a defendant in this matter.

ROSENN, JENKINS & GREENWALD

BY: /s/ Robert Spielman
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Attorneys for Carrier Coal Enterprises, a Pennsylvania partnership

SCOTT F. LINDE and LACKAWANNA LAND AND ENERGY, INC.	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiffs,	:	CIVIL ACTION - EQUITY
vs.	:	
THOMAS H. KILEY, RECEIVER OF RAYMOND COLLIERY CO., INC. AND ITS SUBSIDIARIES	:	NO. 57 of 1989
Defendant,	:	

ANSWER AND NEW MATTER OF PLAINTIFFS SCOTT F. LINDE AND LACKAWANNA LAND AND ENERGY, INC., TO THE PETITION TO INTERVENE FILED BY CARRIER COAL ENTERPRISES

Come Now the plaintiffs, Scott F. Linde and Lackawanna Land and Energy, Inc., by their attorneys, Dilworth, Paxson, Kalish & Kauffman, and make answer as follows:

1. Plaintiffs lack information sufficient to form a belief about the allegations of Paragraph 1 and said allegations are deemed denied.

2. Admitted.

3. The allegations of Paragraph 3 are admitted with the qualification that on April 28, 1989, plaintiff Scott F. Linde *did* assign all his right, title and interest in the Agreement of Sale to plaintiff Lackawanna Land and Energy, Inc.

4. Admitted.

5. Admitted. However, the assignment to Carrier Coal, by its terms, became null and void when the district court on January 24, 1989, refused to approve of the assignment and Carrier Coal failed to appeal the district court's decision.

6. The allegations of Paragraph 6 are admitted to the extent that the attempted assignment of Linde to Carrier predated Linde's assignment to Lackawanna Land and Energy, Inc.

7. Admitted.

8. The allegations in Paragraph 8 are admitted to the extent Linde has filed an appeal from the district court's decision of January 24, 1989. By way of further answer, the primary thrust of Linde's appeal is to reverse the district court's decision that refused to confirm the Agreement of Sale between Linde and the Receiver since no higher bid was made by the September 2, 1988 bidding deadline.

9. Admitted. By way of further answer, Linde's appeal, *inter alia*, contests the validity of the second auction.

10. Admitted.

11. Admitted.

12. The allegations of Paragraph 12 are admitted to the extent that Carrier was the high bidder at the second auction. By way of further answer, it is incorrect for Carrier to characterize itself as a successful bidder since the United States District Court for the Middle District of Pennsylvania has yet to approve sale of the subject real

estate to Carrier for the price Carrier bid at the second auction.

13. All allegations of Paragraph 13 are denied. It is specifically denied that Carrier currently possesses any vested, legally enforceable interest in the real estate which is the subject of this lawsuit. By way of further answer, because it is entirely possible that the Third Circuit Court of Appeals, which is scheduled to hear argument on Linde's appeal on July 10, 1989, will uphold the district court regarding its decision to invalidate the assignment from Linde to Carrier while reversing the district court on its decision to make the Agreement of Sale subject to a second bidding procedure, Carrier's interest is a highly contingent one and, thus, not legally enforceable at this time.

14. Plaintiffs lack knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 14 and said allegations are deemed denied.

WHEREFORE, plaintiffs pray that the court deny the Petition to Intervene filed by Carrier Coal Company.

NEW MATTER

15. The Petition to Intervene filed by Carrier Coal Enterprises is procedurally defective in that it is not verified by a party as mandated by Rules 1024(c) and 2328 of the Pennsylvania Rules of Civil Procedure.

16. The Petition to Intervene filed by Carrier Coal Enterprises does not acknowledge that Carrier's claim is in subordination to and in recognition of the propriety of

the action as mandated by Rule 2329(1) of the Pennsylvania Rules of Civil Procedure.

17. There is no need for Carrier to intervene as its interest in the litigation is already adequately represented by Defendant Thomas H. Kiley.

18. Carrier meets none of the criteria to be a proper intervenor as outlined in Rule 2327 of the Pennsylvania Rules of Civil Procedure.

WHEREFORE, plaintiffs pray that the court dismiss the Petition to Intervene filed by Carrier Coal Company.

Respectfully submitted,

DILWORTH, PAXSON, KALISH
& KAUFFMAN
/s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Esq.
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(717) 346-7569

Attorneys for Plaintiff
Scott F. Linde

Dated: June 26, 1989

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
vs.	:	CIVIL NO:
GLENEAGLES INVESTMENT CO., INC., et al	:	80-1424
DEFENDANT	:	

BEFORE THE HONORABLE MALCOLM MUIR, U. S. DISTRICT COURT JUDGE, IN WILLIAMSPORT, PENNSYLVANIA, ON THURSDAY, THE 19TH DAY OF APRIL, 1990

HEARING ON COLLUSION
Volume I - Pages 1 to 171

APPEARANCES:

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ROSENN, JENKINS & GREENWALD
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Robert Spielman, Esquire

15 South Franklin Street
Wilkes-Barre, PA 18711

[p. 90] from Carrier Coal, they're very angry that I've agreed to include Clinton Colliery in our Wayne County land, I wouldn't call it deal but transaction, and that would you please call your brother and ask if they would consider taking this Clinton Colliery property out of it. I said that I would do so but that I didn't hold out a lot of hope for it.

Q Did you contact your brother?

A Yes, I did.

Q And as a result of that telephone conversation you were not able to take that particular tract out of the Wayne County transaction?

A Yes, he said we would take it out but then we would have to revert back to the original land that had been shown on the prospectus which was only 611 acres as opposed to 865 acres and would then want a prorated price from the $365,000 to somewhere in the neighborhood of $250,000, but that we would need to do that.

Q Did you then get back to Mr. Kiley?

A I think I got back to Mr. Kiley or – quickly but we had – I was on my way to Wilkes-Barre anyway, the bank representatives were from Wilkes-Barre and I think I stated something like well, I would be interested in possibly purchasing those agreements.

Q Purchasing the –

[p. 91] A Remaining agreements that Carrier – that he had led me to believe that Carrier had just refused to execute with him.

Q These would be what we describe as the seven parcels of land?

A Yes.

Q Now, did you meet with Mr. Kiley on May 19th, 1988?

A Yes, I went directly there. I stopped – it's only about a block and a half away, he said he would wait for me because it would be very close, I felt, to around five o'clock, it's two years ago, okay, and that I said I would be right up to pick up a copy of the proposed agreement for review.

Q By the way, I trust you knew where Mr. Kiley's office was and you had dealt with him before?

A Yes, I had dealt with him both in a lease agreement on a cogeneration plant which a firm that I worked for was involved in the construction and he leased me some land for our trailers and such and I had also just been the low bidder on a supposed 865 acre tract in Wayne County, low and only bid.

Q Or perhaps it would be better to say the high bid or the successful bid?

A It was the only one that day that I remember.

Q In any event directing your attention again to May [p. 92] 19th, 1988 you arrived in the late afternoon at Mr. Kiley's office.

A That's correct.

Q Was anyone with you?

A No, I dropped off the three representatives five minutes before.

Q Was anyone in Mr. Kiley's office with him?

A I recall no one.

Q Would you tell us what you discussed at his office on May 19th?

A It's my recollection that basically I told him that I would be interested in reviewing the sales agreement but obviously I'm just trying to get enough money to buy the $365,000 plot so I probably wouldn't have enough to execute this and I needed to have this sales agreement to go out as quickly as possible and see if I could get additional people to enter in with me to possibly execute the agreement. I had never seen the agreement before so it was something new to me.

Q Would these be people--might you have characterized these people as co-investors with you?

A Yes, I think that's--

Q Okay. And Mr. Kiley gave you the--a copy of an agreement. Was that the copy of the agreement that was proposed to be signed between the Receiver and Carrier Coal?

[p. 93] A I believe or I believe the name might have been changed or we changed it at the time or something like that, but yes, substantially it was my understanding

it was the same agreement that they had just refused to sign.

Q Did you--how long did you say this meeting lasted?

A I would say five to ten minutes, maximum. I was--quite honestly it was after five and I wanted to go to work.

Q Did you discuss price?

A Yes, I believe that there was a $1,483,000 price at that point.

Q Did you discuss how you would arrive at that price, how that price was determined?

A I think that it had been 1,528,000, now, I could be off on that number, and that when he had--I'll put the Clinton property which was one of the eight properties at that point into my proposal, he had raised that proposal from 365,000 to $410,000. That represented approximately a $45,000 increase and I think if you take those numbers off from one million five twenty-eight you come back quite close to the one million four eighty-three that he was then asking for the remaining seven properties.

Q In any event, at the May 19th meeting, you at least had had enough time to discuss the purchase price and how that price was arrived at?

* * *

[p. 273] A I did not object.

Q Now you have a background of lifetime in banking, Mr. Kiley?

A Yes.

Q And since you retired as President of the First Eastern Bank you've been in the real estate business?

A Yes.

Q You know what an assignment is?

A Yes.

Q You know if there was any question or problem with the identity of a potential assignee it certainly could have been written in the agreement could it have not?

A Yes.

Q And there is no qualifications, no restrictions, no identification, no qualification to the word assigns in this agreement, is there?

A That's correct.")

MR. VANASKIE: That's all we have from Mr. Kiley's testimony.

MR. BRENNAN: I have nothing to add to that.

MR. VANASKIE: Now, Your Honor we have excerpts from the deposition of Barbara Warakomski. Starting at page four, line five.

(Excerpt of deposition testimony of Barbara Warakomski was [p. 274] read as follows by Mr. Vanaskie:

"Q Barbara, by whom or how are you presently employed?

A I am employed at Raymond Colliery Company Receivership.

Q How long have you been employed at Raymond Colliery Company Receivership?

A Since its inception, July 1, 1986.

Q And you work for Mr. Kiley?

A That's correct.

Q Are there any other employees of Raymond Colliery Company Receivership in the office maintained by Mr. Kiley?

A No.

Q Where are those offices located?

A 11 West Market Street, First Eastern Bank Building.")

MR. VANASKIE: That's all I have, Your Honor, on that page. Then I would go to page six, line one.

Q Can you tell me what your duties and responsibilities are presently?

A Well, I am titled administrative assistant and I participate in most of what goes on in the office.

Q When you say you participate in what goes on in the office, do you participate in discussions that Mr. Kiley may have with prospective purchasers of land?

A Yes I do.

[p. 275] Q And do you participate in discussions with Mr. Kiley pertaining to this litigation?

A Yes, I do.")

MR. VANASKIE: Now we turn, Your Honor, to page seven, line fourteen.

("Q Now, do you know Scott Linde?

A Yes, I do.

Q How long have you known Mr. Linde?

A I believe I met him maybe early 1987.

Q And did you participate in discussions or were you participating in discussions that Mr. Linde and Mr. Kiley were involved in concerning purchase of Raymond Colliery properties in Wayne County?

A Yes.

Q Now did you participate in discussions that Mr. Kiley had with representatives of Carrier Coal concerning the land that is the subject of the May 20th, 1988 Agreement of Sale?

A Yes.")

MR. VANASKIE: Your Honor, we turn now to page nine, line ten.

("Q Prior to May 20th of 1988 had there been an agreement reached between Carrier Coal and Mr. Kiley with respect to the land that is the subject of the May 20th, 1988 Agreement of Sale?

A Yes.

[p. 276] Q And was that agreement reduced to writing if you know? Was there a written contract?

A I don't think I can answer that. Would you rephrase it?

Q Well, I'll try. You indicated that, and correct me if I'm wrong, that there had been an agreement between Mr. Kiley and Carrier Coal on these lands that are at issue here and was there then as far as you knew agreement as far as how much money would be paid for the land?

A Well, alright, yes, there was an agreement, a written agreement, that had not been signed but there was a handshake agreement on the written agreement.

Q There was a handshake between Mr. Kiley and representatives?

A Mr. Steinberg.

Q Do you recall what the consideration was, the amount that was to be paid?

A Well, it was something more than $1,483,000 because it included the Clinton bank, a million five something.

Q Now the Clinton bank was eventually conveyed to Mr. Linde, is that not correct?

A That's correct.")

MR. VANASKIE: Page eleven, line nine.

("Q Were you aware prior to May 20th 1988, were you aware of discussions that Mr. Kiley had with Mr. Linde concerning [p. 277] the purchase of the lands in question?

A Prior to May 20th?

Q Yes.

A Yes.

Q And how were you aware of that?

A I was in the office when that discussion took place.

Q Now, your office, Barbara, is it located immediately outside of Mr. Kiley's?

A Adjacent to Mr. Kiley's office, yes.

Q You were in Mr. Kiley's office at the time the discussion between Mr. Linde and Mr. Kiley occurred?

A No, I was in my office.

Q You were in your office but you could overhear?

A Yes.

Q And was this a meeting that Mr. Linde appeared for or was it a telephone discussion?

A Initially it was a phone call.

Q Can you tell me what you remember about the phone call?

A There was a discussion regarding the Clinton bank that the Clinton bank would be included in what we call the Wayne County deal and an indication to Mr. Linde that it would jeopardize perhaps the agreement with Carrier.

Q Do you recall anything--first of all, do you recall when that discussion occurred?

[p. 287] [sic] A Yes.

Q Prior to the time that they were under contract with Scott my understanding is that there had been a

handshake to put these lands under contract of sale to Carrier, is that correct?

A That's correct.

Q Now, once the Clinton culm [sic] bank was taken out of the picture did Mr. Kiley have any discussions with Mr. Steinberg concerning Carrier purchasing the balance of the lands?

A Oh, there was a phone call, I believe there was a phone call to Mr. Myrtetus telling him that the Clinton bank had been removed.

Q And did Mr. Kiley in that phone call offer to sell the balance, what I am calling the balance of land, everything but Clinton for $1,438,000?

A I don't know that the amount was mentioned but the land was available.

Q And what was Carrier's position as you understand it?

A We didn't have a response positive or negative from them at that point.

Q Did Mr. Kiley ever communicate to Mr. Steinberg or Mr. Myrtetus that Scott was interested in purchasing the land before Scott actually consumated the deal?")

MR. VANASKIE: And we go over to page 63,